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WILCOX & CO

No. 7695

United States

Circuit Court of Appeals

For the Ninth Circuit.

GUS B. GREENBAUM, CHARLES GREENBAUM and WILLIAM GREENBAUM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the District of Arizona.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the District of Arizona.

C-4879-Phoenix.

UNITED STATES OF AMERICA,

Plaintiff,

—vs—

A. E. SANDERS, H. D. SANDERS, GUS B. GREENBAUM, CHARLES GREENBAUM, WILLIAM GREENBAUM,

Defendants.

INDICTMENT.

Violation: Section 338, United States Code, Title 18. (Use of United States Mails in furtherance of a scheme to defraud)

United States of America,
District of Arizona.—ss.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF ARIZONA. AT THE NOVEMBER TERM THEREOF, A.D. 1932.

The Grand Jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the Court aforesaid, on their oath present that prior to the dates on which the letters were mailed, as hereinafter alleged in the several counts of this indictment, A. E. SANDERS, H. D. SANDERS, GUS B. GREENBAUM, WILLIAM GREENBAUM, and CHARLES GREENBAUM, late of

the City of Phoenix, State of Arizona, in said District and Division, hereinafter called " defendants", whose true and full names are, and the true and full name of each of whom is, other than as herein stated, to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth, from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Oscar Schmidt, Jennie Halpin, G. Pape, Addie Driscoll, Effie A. Curry, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded", which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931.

It was a part of said scheme and artifice that the defendants should and they did, on November 23, 1928, organize and incorporate under the laws of the State of Arizona, a corporation known as "Clarence Saunders Stores, Inc.", with a capitalization of 300,000 shares of common stock of no par value, and 15,000 shares of preferred stock of the par value of $100.00 per share, for the purpose of engaging in the business of merchandising

by means of numerous "chain" grocery stores in the State of Arizona and other States, using the name "Clarence Saunders Stores, Inc." [4]

It was a further part of said scheme and artifice that the defendants should and they did change the name of said Clarence Saunders Stores, Inc., successively to Arizona Clarence Saunders Stores, Inc., United Clarence Saunders Stores, Inc., and to United Sanders Stores, Inc., which said corporations were at all times dominated and controlled by said defendants.

It was further a part of said scheme and artifice that the said defendant A. E. Sanders should and he did transfer to said Clarence Saunders Stores, Inc., a certain Franchise Agreement by and between himself and the "Clarence Saunders Corporation", which said Franchise Agreement provided that the said A. E. Sanders would pay one-half of one per-cent of the gross sales in all stores operated by him for the use of the trade name "Clarence Saunders"; and that said defendant should and he did transfer to said Clarence Saunders Stores, Inc., a certain Option Agreement to purchase five Cashway Stores in the City of Tucson, Arizona, in consideration for the issuance to the said defendant A. E. Sanders of 151,000 shares of the common capital stock of said Clarence Saunders Stores, Inc.

It was further a part of said scheme and artifice that the defendants should and they did set up as an asset on the books of said Clarence Saunders

Stores, Inc., the sum of $151,000.00 for the concession to use the name "Clarence Saunders" in said merchandising business; whereas in truth and in fact, as the defendants then and there well knew and intended, said concession was of little or no value.

It was further a part of said scheme and artifice that the defendants should and they did issue and sell to said defendant A. E. Sanders for the sum of one dollar ($1.00) 35,000 shares of the common stock of said Clarence Saunders Stores, Inc., and that the defendants sold to the persons to be defrauded more than three-fifths of said 35,000 shares of common stock for the benefit and profit of the said defendants and not for the benefit of said corporation.

It was further a part of said scheme and artifice that the defendants should and they did, under the name of Greenbaum Brothers and the Bond and Mortgage Corporation, sell and offer to sell to the persons to be defrauded the common and preferred stock and debenture bonds of said Clarence Saunders Stores, Inc., and its successors, by means of false and fraudulent statements as to the financial condition of said corporation and its successors.

It was further a part of said scheme and artifice that the defendants should and they did authorize and pay, on June 29, 1929, a semi-annual dividend, on the basis of eight (8) per cent per annum, on

all preferred stock of said Clarence Saunders Stores, Inc., of record as of April 30, 1939; whereas in truth and in fact, as the defendants then and there well knew said corporation had at all times been operating at a financial loss and said dividend was not earned by said corporation but was paid from the capital of said Clarence Saunders Stores, Inc.

It was further a part of said scheme and artifice that the defendant H. D. Sanders and his associates should and did on May 15, 1929, organize and incorporate under the laws of the State of Arizona, the Piggly Wiggly Holding Corporation, the name of which said corporation was changed to the "U-Save Holding Corporation" on February 24, 1930, and which corporation was thereafter engaged in business in the City of Los Angeles, State of California.

It was a further part of said scheme and artifice that the said "U-Save Holding Corporation" should and it did acquire the majority of the common capital stock of the said United Sanders Stores, Inc., (which said corporation was the successor of said Clarence Saunders Stores, Inc.) and proceeded to take charge of the assets of the said United Sanders Stores, Inc., and removed certain merchandise valued at more than $100,000.00 from the warehouse of said United Sanders Stores, Inc., at Phoenix, Arizona, Tucson, Arizona and Nogales, Arizona, [5] and shipped said merchandise to Los Angeles, California, without rendering just and proper compensation therefor.

It was a further part of said scheme and artifice that the defendants should and they did authorize and pay in the form of a dividend interest at the rate of eight (8) per cent per annum on all the preferred capital stock of record as of December 31, 1929, of said Arizona Clarence Saunders Stores, Inc., together with interest at said rate on all money that had been paid in to said corporation on subscriptions for said preferred stock which had not been fully paid for; whereas in truth and in fact, as the defendants then and there well knew, said corporation had at all times operated at a financial loss and there was a surplus deficit of more than $144,000.00, and that the dividend or interest was not paid from earnings or surplus of said corporation, but from the capital of said Arizona Clarence Saunders Stores, Inc.

It was further a part of said scheme and artifice and in furtherance thereof, that the defendants, for the purpose of inducing the persons to be defrauded to part with their money and property in the purchase of the common and preferred stock and the debenture bonds of said Clarence Saunders Stores, Inc., and its successors, would and did unlawfully, fraudulently and knowingly and feloniously make false pretenses, representations and promises to the persons to be defrauded, through and by means of conversations, letters, circulars, financial statements, newspapers and advertisements, in substance and effect as follows, to-wit:

1. To the effect that the business of said Clarence Saunders Stores, Inc., was being conducted under the "Guiding hand" of Clarence Saunders; when in truth and in fact, as the defendants then and there well knew, Clarence Saunders had no hand in the management or supervision of the business of said corporation;

2. To the effect that the business of said corporation was being efficiently handled and large and substantial profits were being made; when in truth and in fact, as the defendants then and there well knew, the business of said corporation was not being efficiently handled and large profits were not being made and said corporation was operating at a financial loss;

3. That "We earnestly believe that as time goes by you will find that your investment in Clarence Saunders Stores will be one of the most profitable ever made"; when in truth and in fact, as the defendants then and there well knew, said investments would not be the most profitable ever made, or profitable at all, but the corporation was at all times operating at a loss;

4. That "Our Common stock is now being sold at $7.50 per share, this raise being justified by the very satisfactory condition of the company, which has really exceeded our expectations"; when in truth and in fact, as the defendants then and there well knew, the raise in the price of said stock was not justified by the very satisfactory condition

said corporation and said stock was practically worthless;

5. That "Your Arizona Clarence Saunders Stock is not a gambling proposition. It is an investment. Through your preferred stock you are receiving 8% a year on your investment from the proceeds of all the stores and warehouses. I believe that your common stock will eventually surprise you by the large annual income per share you will receive from it over a long period of years."; when in truth and in fact, as the defendants then and there well knew, said stock was a gambling proposition and not a safe investment, the 8% per annum paid on the preferred stock was not paid from the proceeds produced by all the stores and warehouses of said corporation but was paid from capital and there was no probability that the common stock of said corporation would eventually earn a large annual income or any income at all; [6]

6. To the effect that during the ten months, ended November 26, 1929, the stores of said corporation then in operation had made splendid profits; when in truth and in fact, as the defendants then and there well knew, said stores did not make splendid profits during said period or any profits at all, but operated at a loss;

7. That "While this development is going on, residents of Arizona have an opportunity to become part owners of these stores and share in their splendid profits"; when in truth and in fact, as the de-

fendants then and there well knew, the investors in said stock would not share in splendid profits from said stores or any profits at all as said stores were being operated at a loss;

8. That "We want you to know and feel that you are a part of this company and to know that the business is being conducted on the very highest planes and to the interests of its customers and stockholders at all times"; when in truth and in fact, as the defendants then and there well knew, the business was not being conducted on a high plane and in the interest of the stockholders, but was being conducted extravagantly and at a financial loss;

9. That "We expect to open a minimum of ten new stores during the current year (1931), without any increase in our outstanding capital. The Company is in a good financial position, as will be shown by Financial Statement as of December 31, 1930"; when in truth and in fact as the defendants then and there well knew, the corporation could not open ten new stores without additional capital and said corporation was not in a good financial condition, had at all times been operating at a financial loss and was insolvent;

10. That "Exchanging your investment from United Sanders Stores, Inc., to U-Save Holding Corporation, gives you a better investment than you had before, even at the time you made your original purchase. The book value of our Class A.

stock, which we are offering in exchange for your United Sanders Stores, Inc., stock, is $18.60 per share; this value should increase steadily as we expand through franchising our system and we believe that it is only a question of a few years until its selling value will be ten times what its book value is today"; when in truth and in fact, as the defendants then and there well knew, the actual book value of Class A U-Save Holding Corporation stock was not $18.60 per share, as said corporation was practically insolvent and was declared a bankrupt within six months thereafter;

11. To the effect that the stock offered for sale had no connection with the name "Sanders" but that it was strictly stock of the Clarence Saunders Co., the originator of the Piggly Wiggly Stores; when in truth and in fact, as the defendants then and there well knew, the stock offered for sale was not that of the Clarence Saunders Corporation but that of a corporation over which Clarence Saunders had no control;

12. To the effect that the Arizona Clarence Saunders Stores, Inc., would guarantee interest on its stock after six months no matter what happened; when in truth and in fact, as the defendants then and there well knew, said company did not intend to guarantee and pay interest on said stock for any definite time;

13. To the effect that the Arizona Clarence Saunders Stores, Inc., was making large profits;

that the common stock would be worth $25.00 per share within ninety days and that the company had no indebtedness; when in truth and in fact, as the defendants then and there well knew, there was no possibility that the common stock would be worth $25.00 per share within ninety days or at all, and said corporation was at tha time heavily in debt and was not *make* profits; [7]

14. To the effect that the common stock of said corporation would soon go on the market at $10.00 per share and upwards, and a $300.00 bonus would be paid on a $1000.00 Debenture Bond of said corporation at the end of three years; when in truth and in fact, as the defendants then and there well knew; they did not intend to list said stock on the market and did not intend to pay a $300.00 bonus or any bonus at all on said Debenture Bonds at the end of three years or at any other time.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 9th day of April, 1930, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the post office of the United States there, to be sent and delivered by the Post

Office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States Postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one, Addie Driscoll, Box 103, Douglas, Arizona, the said Addie Driscoll, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"Bond and Mortgage Corporation
Security Building,
Phoenix, Ariz.
April 9, 1930.

Addie Driscoll,
Box 103,
Douglas, Arizona.

Dear Madam:

"Answering your letter of April 8th, we wish to advise that the Common stock of the United Clarence Saunders Stores, Inc. is being offered to the public through this company for $10.00 per share.

"Trusting that this is the information you desire, we are,

Yours very truly,

BOND AND MORTGAGE CORPORATION,
By: (Signed) M. LOVELAND
ml Assistant Secretary."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are, and the true and full name of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other [8] persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded", which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof.

And the Grand Jorors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 25th day of April, 1930, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the post office of the United States there, to be sent and delivered by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one, Jennie Halpin, 741 W. Pierce, Phoenix, Arizona, the said Jennie Halpin, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"BOND AND MORTGAGE CORPORATION
Security Building,
Phoenix, Arizona.

April 25, 1930.

Jennie Halpin,
741 W. Pierce,
Phoenix, Arizona.

Dear Madam:

We take pleasure in acknowledging receipt of your order for one $500.00 First 8% Serial Gold Debenture of the United Clarence Saunders Stores Inc., and 10 shares of Common Stock, together with your North American Company shares, which have been credited to your account and balance refunded to you as per statement delivered to you by our representative, Mr. Norell. The debenture and certificate for common stock will be mailed to you within a short time.

"We congratulate you upon having made this excellent investment. We believe it will prove to be more and more profitable as the years pass and the great chain of self-service grocery stores continues to grow throughout the Southwest.

"Your name is being entered upon the Company's mailing list today so that you will receive all information and reports relative to its business as they are issued from now on. Please advise us of any change of address.

"We would be glad to receive the names and addresses of any of your friends who you think would be interested in an investment of this high character. Good stockholders strengthen any company. Every new stockholder of sound moral and financial standing added to the list of about 1500 now owning United Clarence [9] Saunders stock, surrounds your investment with just that much more solidity; tends to bring the beginning of dividend payments on the Common just that much nearer.

"Use the enclosed form which is sent for your convenience with a self-addressed stamped envelope.

"Hoping to have the pleasure of receiving your suggestions at an early date, we are,

Sincerely yours,

BOND AND MORTGAGE CORPORATION

By: (Signed) M. LOVELAND

Assistant Secretary."

ml

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are,

and the true and full name of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded" which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 31st day of January, 1931, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place

and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one, Oscar Schmidt, Globe, Arizona, the said Oscar Schmidt, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say: [10]

"UNITED SANDERS STORES, INC.,
305 South Second Avenue
Phoenix, Arizona,
January 31st,
1931

Mr. Oscar Schmidt,
Globe, Arizona.

"Replying to your letter of January 8th, in reference to the $1000 paid on subscription No. 5460.

"This payment was made on a subscription of $2500 and after crediting interest up to December 31, 1929, amount $10.64, leaving a balance of $1489.36.

"As you will readily understand these subscriptions are a bonafide agreement and are not subject

to cancellation. We have paid the selling agents full commission on the subscriptions, and to cancel them would mean a loss either to the Company or to the subscriber. We are not authorized to assume this loss on the part of the Company, and do not wish to ask the subscriber to take the loss. We would suggest that when convenient this balance be paid so that stock for the full amount of the subscription can be issued. It has never been the attitude of the Company to take advantage of the forfeiture clause in these subscriptions, and we are also glad to extend a reasonable length of time in which for them to be paid out. This we will be glad to do in your case.

"Assuring you of our good wishes, and awiating your further advise in the matter, we are

Very truly yours,

UNITED SANDERS STORES, INC.,

GCP (Signed) G. C. PARTEE,

VS Sec. and Tres."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full

names are, and the true and full name of each of whom is, other than as herein stated to the grand Jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded" which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof. [11]

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 1st day of July, 1930, at Phoenix, Arizona, as aforesaid, in said District of Arizona and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and

artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States Postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one Fred Bliklen, R. R. 1, Box 279, Phoenix, Arizona, the said Fred Bliklen, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"UNITED CLARENCE SAUNDERS
STORES, INC.
305 South Second Avenue
Phoenix, Arizona.
July 1, 1930.

Dear Stockholder:

"We are indeed pleased to report the progress that your Company has made for the first half of the year of 1930. The volume of business has steadily increased, and after analyzing the reason for this increase, we have come to the conclusion that the stockholders' personal interest in the affairs of the Company has been the moving factor for the splendid showing that has been made.

"We believe by the end of this year, a large portion of the expansion contemplated for Arizona will be completed, as we expect to have stores in practically every city in the state where one can profitably be operated. The growth of a large Company must necessarily be somewhat slow and steady in order to establish a firm foundation at each step, and we believe the officials of your company have acted wisely, in view of prevailing business conditions.

"The writer has had the pleasure of just returning from Memphis, and judging from the volume of business done by other units throughout the country, Arizona is among the real leaders. We are trying to make the Arizona unit the largest in the country, and the only way this can be accomplished is through your cooperation. Boost your Company wherever possible. Do not listen to idle rumors from competitive sources which are detrimental to your Company. Instead of listening, boost your own Company.

"With best wishes, we are

Sincerely yours,

UNITED CLARENCE SAUNDERS STORES, INC.

Aes:ml By: (Signed) A. E. SANDERS, President."

contrary to the form of the statute in such case

made and provided, and against the peace and dignity of the United States of America. [12]

FIFTH COUNT: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona whose true and full names are, and the true and full names of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young, and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded" which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof.

And the Grand Jurors aforesaid, upon their oath aforesaid do further present and show that said de-

fendants, on the 3rd day of April, 1930, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the person to whom the some was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one Monroe Young, Route 5, Phoenix, Arizona, the said Monroe Young, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"UNITED CLARENCE SAUNDERS
STORES, INC.,
305 South Second Avenue,
Phoenix, Arizona.
April 3, 1930.

From A. E. Sanders, President,
United Clarence Saunders Stores, Inc.
Dear Stockholder:

"We wish to inform you briefly as to what

your Company's plans are for the future, and what its accomplishments have been in the past. It is, as you know, the policy of the Company to keep its stockholders advised at all times as to what is being done.

"In the Wall Street Journal of Thursday morning February 20, 1930, Henry Ford, in a recent interview at Ft. Meyer, Florida, stated: "The price of food is too high. Mass production is the answer to such questions as this. We have therefore, the chain stores, which have developed tremend*u*ously." In other words, Henry Ford advocates chain stores. Such comments are made by many of the largest manufacturers and financiers in the country, whose names are too numerous to mention.

"On April 12th, our Prescott store will be opened, which will start the invasion of the northern territory, and some time during April our store in Glendale will be opened. In the other towns of the state where stores are to be opened, we hope to have them [13] operating by the end of 1930. The volume of business at present has been very satisfactory, and we expect that this year will run into several millions of dollars. Opening of the stores will take place as rapidly as is commensurate with sound business principles.

"*T*The solid progress which has been made by your Company since our first store was opened in Tucson about a year ago has been

noteworthy. The chain store grocery business is a logical and sensible development of the problem presented by the necessity for supplying over one hundred and twenty million people in forty-eight states with food, and properly manages is as you know, immensely profitable.

"Recently the State Corporation Commission granted the United Clarence Saunders Stores, Inc., a permit increasing the price of the Common stock to $10.00 per share, at which price we understand these shares are now being offered by the brokers to the public.

"We wish to impress upon you that the progress of your Company depends upon each and every one of us, so just keep on boosting for Clarence Saunders Stores.

UNITED CLARENCE SAUNDERS
STORES, INC.

eas:ml By: (Signed) A. E. SANDERS
President."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT SIX: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum, and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are,

and the true and full name of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded" which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 9th day of April, 1930, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so have as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully, and feloniously did knowingly place and cause to be placed in the Post office of the United States there,

to be sent and delivered by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return [14] card, direction and address, to-wit: a letter addressed to one, Pearl Gripp, Box 2360 Bisbee, Arizona, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"BOND AND MORTGAGE CORPORATION
Security Building
Phoenix, Arizona.

TO THE PEOPLE OF ARIZONA:

"What amounts to a business revolution is taking place today among the great systems of chain grocery stores which have been for several years past extending throughout the length and breadth of the United States and Canada.

"A giant figure casts a steadily lengthening shadow over the chain store grocery trade—the figure of the celebrated Clarence Saunders.

"His was the master-mind that revolutionized the retail grocery business of the world by originating the self-service grocery store. He built his idea into Piggly Wiggly—something that in its day was absolutely new in retail history.

"He is now building up *anew* and greater chain of money-making self-service stores. His new stores are as much of an improvement over the original self-service grocery chain as they in their time had been over the old-fashioned topsy-turvy cross-roads grocery store with haphazard business methods and shelves on which half the time nobody knew where anything was.

"The story of Clarence Saunders is one of the most fascinating in the whole glamorous history of American business. What John Jacob Astor was to the fur trade; what James J. Hill was to the upbuilding of the Northwest; what Huntington was to California and the Southwest; what Marshal Field was to department store merchandising; what Robert Dollar is to American shipping on the Pacific Ocean, Clarence Saunders is to the chain store grocery business.

"During the year just passed, a new and brilliant *chaper* in the story of Clarence Saunders has been written right *herein* our own State —Arizona. Stores have been opened up rapidly. Negotiations are in progress to have one in every community in the State where one can be profitably operated.

"While this development is going on, residents of Arizona have an opportunity to become *past* owners of these stores and share in their splendid profits.

"We will be glad to send you full details, without obligation or cost to you, upon return

of the enclosed card. It requires no stamp. Just write your name and address on it and drop it in the nearest mailbox.

Sincerely yours

BOND AND MORTGAGE CORPORATION"

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [15]

SEVENTH COUNT: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are, and the true and full name of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. *Ginvenheimer,* Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. *Robers* and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be

defrauded" which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof;

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 26th day of March, 1930, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States, there, to be sent and delivered by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one Mrs. Effie A. Curry, 316 W. Phoenix Avenue, Flagstaff, Arizona, the said Mrs. Effie A. Curry, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following, tenor, that is to say:

"BOND AND MORTGAGE CORPORATION
Security Building,
Phoenix, Arizona.

March 26, 1930.

Mrs. Effie A Curry,
316 W. Phoenix,
Flagstaff, Arizona.

Dear Mrs. Curry:

"We take pleasure in acknowledging receipt of your subscription for 100 shares of Common stock of the United Clarence Saunders Stores, Inc., together with your payment of $300.00, balance of $450.00 to be paid at the rate of $45.00 per month for 10 months excluding June, July and August. Upon completion of payments certificates will be issued in your name and forwarded promptly by Registered Mail.

"We congratulate you upon having made this excellent investment. We believe it will prove to be more and more profitable as the years pass and the great chain of self-service grocery stores continues to grow throughout the Southwest.

"Your name is being entered upon the Company's mailing list today so that you will receive all information and reports relative to its business as they are issued from now on. Please keep us advised of any change of address. [16]

"We would be glad to receive the names and addresses of any of your friends who you think

would be interested in an investment of this high character. Good stockholders strengthen any company. Every new stockholder of sound moral and financial standing added to the list of about 1500 now owning United Clarence Saunders stock, surrounds your investment with just that much more solidity; tends to bring the beginning of dividend payments on the Common just that much nearer.

"Use the enclosed form which is sent for your convenience with a self-addressed stamped envelope.

"Hoping to have the pleasure of receiving your suggestions at an early date, we are,

Sincerely yours,

BOND AND MORTGAGE CORPORATION
By (Signed)M. LOVELAND
ML:EF Assistant Secretary."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT EIGHT: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are, and the true and full name of each of whom is, other than as herein stated to the grand jurors un-

known, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein all of which persons are hereinafter called "the persons to be defrauded" which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 22nd day of July, 1930, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the person to

whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one, Catherine Ryan, 218 N. Marina Street, Prescott, Arizona, the said Catherine Ryan, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say: [17]

"BOND AND MORTGAGE CORPORATION
Security Building,
Phoenix, Arizona.
July 22, 1930.

Catherine Ryan
218 N. Marina Street,
Prescott, Arizona.

Dear Madam:

"We are certainly pleased to enclose herewith stock certificate #1893 in the United Clarence Saunders Stores, Inc.

"We earnestly believe that as time goes by you will find that your investment in United Clarence Saunders Stores, Inc. will be one of the most profitable ever made. The stores were created by a genius in this particular line of merchandising. Clarence Saunders through his wonderful merchandising methods established

the Piggly Wiggly Stores and when retired had built a business in a few years that was prosperous and known all over the world, and his new stores are just as much advanced in modern merchandising as his old stores were over the old style grocery. With Clarence Saunders' guiding hand over the different stores to be established under his name, we can only say one thing and that is within a few years you will find Clarence Saunders Stores the outstanding food distribution stores in the world.

"Thanking you for the business which has culminated in the delivery of the enclosed certificate, and trusting that you will take further advantage of our facilities for investment counsel and service as you may from time to time require them, we are

Sincerely yours,

BOND & MORTGAGE CORPORATION

ml; ef By: (Signed) M. LOVELAND, (e. f.)"

Assistant Secretary.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT NINE: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix,

State and District of Arizona, whose true and full names are, and the true and full name of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young, and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded", which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof. [18]

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 9th day of May, 1930, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of

executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the persons to whom the same was then and there directed, a certain letter, to-wit: a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, direction and address to-wit: a letter addressed to one, Mrs. J. O. Parsons, Flagstaff, Arizona, the said Mrs. J. O. Parsons, to whom said letter was so directed was then and there one of the persons to be defrauded as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"BOND AND MORTGAGE CORPORATION
Security Building,
Phoenix, Arizona.
May 9, 1930.

Mrs. J. O. Parsons,
Flagstaff, Arizona.

Dear Mrs. Parsons;

"We are handing the United Clarence Saunders Stores Inc. a check for the balance of your account due them, in the amount of $1312.19 and they will send certificates out at once. We are crediting your account for your Bldg. and Loan with $1450.00 and also your check for $175.00, totaling $1625.00. The difference between the $1312.19 that we are pay-

ing the United Clarence Saunders Stores Inc. and the total credit of $1625.00, or $312.81, we are crediting on the subscription you have given our Mr. A. C. Collins for $700.00 worth of 8% debentures; the balance of $387.19 to be paid in equal monthly payments at the rate of $38.71 per month.

"If we realize a greater amount for this Bldg. & Loan, we will credit your account with this and notify you of same.

"We thank you for this business and wish to assure you that we are at your service at any time.

Yours very truly,

BOND AND MORTGAGE CORPORATION,
ml By (Signed) M. LOVELAND
Assistant Secretary."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT TEN: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are, and the true and full name of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a *cheme*

and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman [19] Willard Biggs, E. T. *Bingeheimer,* Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded" which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which allegations are by reference made a part hereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 19th day of February, 1931, at Los Angeles, California, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the per-

son to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one, W. H. Forman, Phoenix, Arizona, the said W. H. Forman, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"U-SAVE HOLDING CORPORATION
Central Manufacturing District
4726 Everett Court,
Los Angeles, California.

February 19, 1931.

W. H. Forman,
Phoenix, Arizona.

Dear Mr. Forman:

"United Sanders Stores, Inc., is only valuable as an operating company, and it must be operated economically, its reserves built up and some of its intangibles charged off before it can become profitable. You can readily realize that this can only be done with strong economical management, and even then it will take time, due to the unfavorable general conditions now existing throughout the country.

"U-Save Holding Corporation has a comparatively small amount of stock outstanding. Ex-

changing your investment from United Sanders Stores, Inc. to U-Save Holding Corporation, gives you a better investment than you had before, even than at the time you made your original purchase. The book value of our Class A. Stock, which we are offering in exchange for your United Sanders Stores, Inc. stock, is $18.60 per share; this value should increase steadily as we expand through franchising our system and we believe that it is only a question of a few years until its selling value will be ten times what its book value is today.

"We are writing to you as one of the largest stockholders, knowing that you will give the matter due consideration as you want to protect and improve your investment, and believe that you will agree with us that the value of exchange is more than fair; also, that you will appreciate the fact that through consolidation economies can be put into effect that could not be done otherwise. This is the most logical plan to preserve and increase the value of your original investment. [20]

"For the benefit of yourself and other stockholders we would appreciate an acceptance or refusal by February 25th.

Very truly yours,

(Signed) H. D. SANDERS,

President"

which said statements made by the defendants in said letter, as aforesaid, were false and untrue, and

the said defendants knew the same were false and untrue at the time they made the same, contrary to the form of the statute in each case made and provided, and against the peace and dignity of the United States of America.

COUNT ELEVEN: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are, and the true and full name of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman. Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded" which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the

first count of this indictment, which said allegations are by reference made a part hereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 25th day of January, 1931, at Los Angeles, California, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States Postage in the sum of two cents and the following return catd, direction and address, to-wit: a letter addressed to one, Willard Biggs, Box 174, Silverbell, Arizona, the said Willard Biggs, to whom said letter was so directed was then and there one of *ther* persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"U-SAVE HOLDING CORPORATION
Central Manufacturing district,
4726 Everett Court,
Los Angeles, California.
January 25, 1931.

TO STOCKHOLDERS
UNITED SANDERS STORES, INC.

"U-Save Holding Corporation has been requested by many of the large stockholders of the United Sanders Stores, Inc. of Arizona to work out some basis for a merger of that Company with U-Save Holding Corporation, that would provide them an opportunity to exchange their stock for stock in U-Save Holding Corporation.

"U-Save Holding Corporation has recently acquired ownership of a majority of common stock in United Sanders [21] Stores, Inc. and is directing the operations of that Company in close affiliation with its own system of U-Save Stores. This working arrangement will ultimately prove of great advantage to the stockholders of United Sanders Stores, Inc., for it will materially reduce that Company's cost of management, add to buying power, and permit their stores to share in the economies of U-Save System of operation.

"U-Save Holding Corporation wishes to state frankly that it has assumed this management principally from its desire to be of service in safeguarding the investment of itself and all

other stockholders of United Sanders Stores, Inc. An examination of the assets, condition and prospects of both Corporations will disclose to anyone that the benefits of this arrangement will flow principally to the stockholders of United Sanders Stores, Inc. In view of the conditions as disclosed in your Company's annual report to its stockholders, it is apparent, that even with the benefits of the present arrangement, it will be several years before any return can be made upon the capitalization now outstanding.

"We think it hardly open to question but that an absolute merger of the assets of the two Corporations and an exchange of stock for stock in U-Save Holding Corporation upon a basis of actual value would not only present a more sound and economical opportunity for U-Save Holding Corporation to work out and conserve the great potential value that this fine group of stores contains, but it would be of immense ultimate advantage to the stockholders of the United Sanders Stores Inc. who exchanged their stock. They would not only strengthen their own investment, but they would share in all the earnings of the entire U-Save System.

"U-Save System Stores are now safely launched on their way to nation-wide development. The bulk of this expansion will occur

from the sale of Franchise rights *fo* use of U-Save name and fixtures for groups of U-Save Stores throughout the nation. The earnings accruing to U-Save Holding Corporation from Franchise sales and Royalties from Franchised U-Save Stores will all belong to holders of U-Save Holding Corporation Common stock, and the result in dividends out of all proper-tion to its original cost. Therein lies the opportunity for stockholders of United Sanders Stores, Inc., who exchange their stock to more than recover their original investment and still retain the principal.

"U-Save Holding Corporation has no desire to change the set up of United Sanders Stores, Inc. or undertake the solution of its affairs, except it be upon the request of that organization and all of its stockholders; and not even then except upon an equitable exchange of stock based upon present actual value. We are sincere in our desire to be of service to the investors in United Sanders Stores, Inc., and are willing to go to the limit of fairness to the stockholders of U-Save Holding Corporation.

"In view of the above we have had a C.P.A. audit of both companies and on this basis and subject to the approval of the Corporation Commission and the acceptance of the stockholders of United Sanders Stores Inc., we offer to exchange:

"4 shares U-Save Class A for 1 share United Sanders Stores Inc. Preferred

"1 share U-Save Class A for 10 shares United Sanders Stores Inc. common. [22]

"We believe that an exchange on this basis will be greatly to the advantage of every stockholder of United Sanders Stores, Inc., and will result in an ultimate profit *forar* in excess of what they could otherwise realize. You will also realize that this proposition is based on conditions as they exist now, and coul*t* not be made by us except for immediate acceptance within a limited time, and conditioned upon the deposit of practically all of the stock of United Sanders Stores Inc., with the secretary of your own Company at Phoenix, Arizona, properly endorsed for exchange upon basis, by February 25, 1931.

"Should you desire to accept this *officer,* please endorse your certificates and send at once to your secretary together with signed instructions in line with form enclosed. In the event that practically all stock has not been deposited for exchange by February 25, 1931, the present offer will expire, and your stock will be returned.

"A form of instructions is enclosed, and your secretary will forward you a receipt for your stock and be guided by your instructions. We leave the decision entirely with you. We are

confident you will agree that a time limit is necessarily a part of the offer.

"If this exchange is consummated, the result would be that United Sanders Stores, Piggly Wiggly Southwestern, Piggly Wiggly Yuma Company and U-Save Stores would operate as one company and each and every stockholder would participate in the earnings of the combined organization, its patents, copy rights, and Franchise values, as well as store operations.

Yours truly,
U-SAVE HOLDING CORPORATION
H. D. SANDERS,
President."

which said statements made by the defendants, in said letter, as aforesaid were false and untrue, and the said defendants knew same were false and untrue at the time they made the same; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT TWELVE: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are, and the true and full name of each of whom is, other than as herein stated to the grand

jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded" which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 10th day of January, 1931, at Phoenix, Arizona, aforesaid, in said District [23] Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered

by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one, E. T. Bingenheimer, the said E. T. Bingenheimer, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"UNITED SANDERS STORES, INC.
Phoenix, Arizona,

January 10, 1931.

TO THE STOCKHOLDERS OF
UNITED SANDERS STORES, INC.

"United Clarence Saunders Stores, Inc. was incorporated under the laws of the State of Arizona, October 25, 1928.

"The foundation on which your company was formed and started to build was a concession from the Clarence Saunders Corporation, covering the states of Arizona and New Mexico. The original organizers of your company had an ambitious and practical plan for the development of stores throughout the states covered by their concession. The first store was opened in January 1929. The company made exceed-

ingly rapid progress during the year 1929 and enjoyed the full confidence of the trade.

"During the fall of 1929 your company contracted for merchandise not only for the stores it was then operating, but in anticipation of the stores covered by their expansion program. This merchandise was contracted for delivery as required up to May 1930. A general business depression had meanwhile settled over the entire nation, merchandise values declined and your company took a market loss on the merchandise it had in the stores also on the merchandise contracted in anticipation of new stores. This merchandise loss was exceedingly heavy.

"Plans had been completed for the development of stores in New Mexico, as well as additional stores in Arizona during 1930, and considerable money had been spent in preparation for this expansion. Early in the year 1930, the Clarence Saunders Stores, Inc. of Memphis, Tenn., a chain organized and then controlled by Clarence Saunders, and, operating under a like concession from the Clarence Saunders Corporation, became involved in financial difficulties and were placed in the hands of a Receiver.

"While neither the Clarence Saunders Stores Company, Inc., nor the Clarence Saunders Corporation had any financial interest in the United Clarence Saunders Stores Inc. of Ari-

zona, (except the receipt of royalties under the Concession) nevertheless this failure affected the credit and confidence of the trade in all units operating under concession from Clarence Saunders Corporation. This loss of confidence and credit so affected your company's business that it became necessary to change its entire set-up and abandon its expansion program. The result was a heavy loss to your Company, due to conditions over which it had no control. [24]

"On November 1, 1930, at a general stockholders meeting the name of the company was changed to the United Sanders Stores, Inc.

"In October 1930 the U-Save Holding Corporation purchased the control of the common stock of the United Sanders Stores, Inc., and since that time have been active in the management of its affairs. Under this new management expenses have been cut approximately $50,000.00 per annum.

"An audit of the books showed that the warehouses were operating at a very heavy loss and it was costing better than 7% to serve the stores through its own warehouses, so the U-Save Holding Corporation purchased the warehouses stocks at actual inventory, and entered into an agreement to serve the United Sanders Stores at cost plus 5%. This mark-up hardly covered the cost of handling the merchandise and is without profit to U-Save

Holding Corporation. The warehouse stocks inventored approximately $110,000.00, and U-Save Holding Corporation gave the Sanders Stores $69,100.00 in Preferred Stock and paid off approximately $40,000.00 of their current indebtedness; in addition to this extended them a line of credit for merchandise, which at the close of the year amounted to $33,842.72 It was a very advantageous arrangement for the stockholders of the United Sanders Stores, as that company received its dividends from the stock it held, its stores were served cheaper than before, and they received cash to pay off the major portion of their current indebtedness.

"The Company is now in a good financial position relative to Assets and Liabilities. However, the Company must be operated and expanded economically and its reserves built up before it can pay dividends upon its present capitalization. This can only be done with the co-operation and support of all stockholders.

"A copy of this report with financial statement, prepared by A. E. Skeats, Certified Public Accountant, is being mailed to each stockholder.

Respectfully submitted,

G. C. PARTEE,

Secretary."

which said statements made by the defendants, in said letter, as aforesaid, were false and untrue, and the said defendants knew same were false and untrue at the time they made the same; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT THIRTEEN: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are, and the true and full name of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Blikken, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons, are hereinafter called "the persons to be defrauded" which said scheme and artifice was in existence and continued in effect to and including

the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof [25]

And the Grand Jurors aforesaid, upon their oath aforesaid do further present and show that said defendants, on the 6th day of October, 1930, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the juris*idc*tion of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit: a letter then and there enclosed in an envelope then and there bearing United States Postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one, G. Pape, 220 W. Van Buren, Phoenix, Arizona, the said G. Pape, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"UNITED CLARENCE SAUNDERS
STORES, INC.
305 South Second Avenue,
Phoenix, Arizona.

October 6, 1930.

NOTICE TO STOCKHOLDERS.

"No doubt you have received a notice of a special meeting called for the latter part of this month. This meeting is of utmost importance to every investing stockholder of the United Clarence Saunders Stores, Inc., and we would certainly like for every one that possibly can to attend this meeting. If not to send in their proxy but we prefer to see them in person.

"The primary purpose for which this meeting is being called is to change the name of the company from United Clarence Saunders Stores, Inc., to The United Sanders Stores, Inc., of Arizona and to further change the plans of the company in respect to operation and management of the additional stores it proposes to establish in this state.

"Under the original plan you were identified with the Clarence Saunders Corporation under a franchise agreement. We are paying one-half of one per cent of our gross sales for this privilege, which amounts to approximately $10,000.00 a year at the present time. The officers of your company have felt for some time that

it would be good business for the company to be able to operate as an independent corporate unit, entirely removed from any affiliations with the Clarence Saunders System.

"Stores would be operated under the trade name of Sanders U-Save System and due to the unfavorable publicity which has been attached to Mr. Clarence Saunders' name in connection with recent business reverses, the name of Clarence Saunders might prove to be more of a liability than an asset to your company. Under the proposed change your company would function as a state unit of The Sanders Stores of America, the corporation to be formed and to control forty-two stores and five warehouses already established and doing business in Arizona and California, known as:

"United Clarence Saunders Stores, Inc.
Piggly-Wiggly Southwestern Company
Piggly-Wiggly Yuma Company
U-Save Holding Corporation

"These stores and warehouses are now doing a volume of business of over $3,000,000.00 annually and have assets totaling approximately $2,800,000.00. [26]

"At this meeting the above plan and change of operating the stores of this company will be discussed and explained in detail and action will be taken in respect to a change of such plans and the officers of the company author-

ized to enter into all necessary contracts carrying out such changed plans, if the same meets with the approval of the stockholders at this meeting. At the present time your company is planning its initial Sanders U-Save store in Tucson and the officers are exceeding desirous of having all necessary preliminary arrangements in connection with any change of plans disposed of in advance of the time this store is opened in order that no delay will occur in establishing other stores in the State of Arizona. Control of the Arizona unit has passed to H. D. Sanders, who, in turn, will pass his control over to The Sanders Stores of America, the Holding Company to be formed.

"H. D. Sanders has had a very wonderful carreer in western merchandising, was a merchandise broker at El Paso, Texas, organized the Texas Produce Company at El Paso, Texas; was also connected with the American Wholesale Grocery Company at El Paso, Texas. Later he entered the retail field, opening the Piggly-Wiggly at Nogales, Arizona; from there he branched out over into the Yuma and California territoy, where he purchased the Piggly-Wiggly Imperial Company, which was absorbed into his U-Save Holding Corporation. The fixtures which he invented are considered the most logical form of retial merchandising and will save the company thousands of dollars by installing the same equipment in our present stores.

"He is a merchandising genius which has seldom been equaled and we know that you could not find a better man to be in charge of this unit.

"Associated with H. D. Sanders will be K. C. Van Atta, born in New York City, his first business training with the Chase National Bank of that city; later connected with the Murray-Lane Wholesale Grocery Company operating wholesale and retail groceries throughout New Mexico and eastern Arizona. For the past five years he was connected with the California Packing Corporation, packers of Del Monte food products, whom he left recently to become connected with this company.

"A. M. Kaler, buyer, has a record that is unequalled in the United States. He has spent the past 24 years directly connected with the food industry; 16 years with Armour and Company and in 1922 he joined the Piggly-Wiggly System, with headquarters at Los Angeles. He took an active part in building up this unit from 16 stores to 200 stores, located in Los Angeles, California and vicinity, Salt Lake City and Ogden, Utah, and Cleveland, Ohio. After leaving this wonderful successful unit, which was purchased by the Safeway Company, he joined the Sun Maid Raisin Growers of Fresno, California, and traveled extensively over the United States, contacting chain stores and other large business. Both his extensive

general experience, as well as the knowledge of advanced chain store methods will be of tremendous value to this company and you are indeed fortunate to secure such an outstanding authority as our Purchasing Agent and Merchandising Manager. [27]

"Warfield Ryley, General Manager; Mr. Ryley is a true descendant from a family of grocerymen. His father before him was in the general mercantile business. Mr. Ryley was born in Kansas City, Missouri, 55 years ago, attended their city schools and both John Hopkins and Yale Universities. For a number of years he was connected with Ridenour Baker Company of Kansas City, Missouri, one of the largest wholesale grocers of the United States. He later entered the general merchandise broker business in Arizona. Mr. Ryley is considered not only a gentleman of the highest integrity but an outstanding merchandise genius.

"Cy Measday, who will be Ma*n*ger of the Tucson division, practically built up your Piggly-Wiggly stores in Tucson and Phoenix. Graduated from the University of Arizona. From a small capital invested in these stores he made a wonderful *c*uccess and earned the stockholders and owners an enormous profit. Recently these stores were sold out to the McMarr Stores and through this consolidation you were f*u*rtunate to secure the wonderful service of Mr. Measday.

"J. S. Mackin: Mr. Mackin, who will be connected with this organization in the capacity of General Manager of Retail Stores, is a merchant with a long record of store management. He is eminently qualified to keep the Sanders U-Save Stores where they are—always one step ahead of the procession.

"He was formerly manager of the Trinity Grocery Company, wholesale grocers at Dallas, Texas; Manager of the American Wholesale Grocery Company, El Paso, Texas; Manager of the Star Cash Grocery, Houston and Dallas, Texas—a chain of 120 retail stores.

"With his knowledge of merchandising methods and chain store management he is invaluable to this organization.

"A. E. Sanders will still be connected with the company and on the Board of Directors, but will be entirely in the Financial Department, associated with Mr. C. L. Patterson, who is the "Banker who turned Grocer". Mr. Patterson came to the U-Save System soon after it organized. Prior to then he had been Vice President and Manager of the First National Bank of Yuma and Yuma National Bank for eight years. In 1926 he organized and became President of the Yuma Trust and Holding Company, leaving that company in February, 1930, to join the U-Save Holding Corporation.

"Mr. Patterson brings to Sanders U-Save System a recognized ability in corporate or-

ganization and finance, having wide acquaintance in southwestern banking circles and a knowledge of legal financial questions gained from long experience in the banking field. The opportunities which the U-Save System presents attracted him to this organization.

"We do not think that there is a chain store organization in the United States with a personnel as capable as the above referred to. Under the old arrangement in single state organizations it was impossible to secure a large group of outstanding men of this caliber on their directorate. [28]

"Mr. A. E. Sanders, the President of this Company, has accomplished something in Arizona, which, we do not think has been equalled. The First Arizona unit was opened June 26, 1929, and in this short term has established 24 stores, doing a business of over $2,000.000.00 per annum and we think they are the best group of stores in the United States. As you all know it costs a considerable amount of money to *pen* and develop stores as rapidly as these and in order to protect all interests and make it the outstanding chain of stores in America we decided to make this change in our general plan. Furthermore under this new change in plan the Sanders Stores of America will guarantee the payment of all interests and principal on debentures and the interest on the pre-

ferred stock, outstanding of the Arizona company.

"They will also establish a Re-sales Department, to handle*d* the resale of securities and under this new plan and set-up we have no doubt but what it will create an active market for your securities as well as show you wonderful returns for we firmly believe that your original investment in the United Clarence Saunders Stores, Inc., is going to be one of the most profitable and pleasant that you have ever made.

"Sincerely yours,

UNITED CLARENCE SAUNDERS
STORES, INC.,

GCP:MD By: G. C. PARTEE,
Secretary."

which said ststements made by the defendants, in said letter, as aforesaid, were false and untrue, and the said defendants knew same were false and untrue at the time they made the same; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT FOURTEEN: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix,

State and District of Arizona, whose true and full names are, and the true and full names of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded", which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 16th day of September, 1930, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and

artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States, there, to be sent and delivered by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, [29] direction and address, to-wit: a letter addressed to one, Pearl Gripp, Box 236, Bisbee, Arizona, the said Pearl Gripp, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"UNITED CLARENCE SAUNDERS
STORES, INC.
305 South Second Avenue,
Phoenix, Arizona.

Sept. 16, 1930.

Pearl Gripp
Bisbee, Arizona
Box 236.

Dear Stockholder.

"We are certainly pleased to enclose herewith your stock certificates for five shares of Preferred and Twenty-five shares of Common Stock in the United Clarence Saunders Stores, Incorporated.

"We earnestly believe that as time goes by you will find that your investment in Clarence Saunders Stores will be one of the most profitable ever made. The stores were created by a genius in this particular line of merchandising. Clarence Saunders, through his wonderful merchandising methods, established the Piggly-Wiggly Stores and when forced out had, in a few years, built a business that was prosperous and known all over the worlds, and his new stores are just as much advanced in modern merchandising as his old stores were over the old style grocery. With Clarence Saunders' guiding hand over the different stores to be established under his name we can see only one thing and that is—within a few years you will find Clarence Saunders Stores the outstanding food distribution stores in the world.

"'We want you to know and feel that you are a part of this company and to know that the business is being conducted on the very highest planes and to the interest of its customers and stockholders at all times.

"With very best wishes, we are

"Yours very truly,

UNITED CLARENCE SAUNDERS
STORES, INC.

By: (Signed) G. C. PARTEE,
Secretary."

ses:md

which said statements made by the defendants, in said letter, as aforesaid, were false and untrue, and the said defendants knew same were false and untrue at the time they made the same; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT FIFTEEN: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenb*uam*, late of the City of Phoenix, State and District of Arizona, whose true and full names are, and the true and full names of each of whom is, other than herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public [30] generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which said persons are hereinafter called "the persons to be defrauded", which said scheme and artifice was in existence and continued in effect

to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof.

And the Grand Jorors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 12th day of August, 1930, at Phoenix, Arizona, aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States Postage in the sum of two cents and the following return card, direction and address, to-wit, a letter addressed to one, John Muldoon, Seligman, Arizona, the said John Muldoon, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

BOND AND MORTGAGE CORPORATION
Security Building,
Phoenix, Arizona.

August 12, 1930.

Mr. John Muldoon,
Seligman, Arizona.

Dear Mr. Muldoon:

"We are very glad to enclose herewith Certificate No. 1978 for 400 shares of Common stock of the United Clarence Saunders Stores, Inc.

" "We earnestly believe that as time goes by you will find that your investment in United Clarence Saunders Stores Inc. will be one of the most profitable ever made.

"Again thanking you for the business you have done through this office, we are,

"Sincerely yours,

BOND AND MORTGAGE CORPORATION.
By: (Signed) M. LOVELAND
ml Assistant Secretary."

which said statements made by the defendants, in said letter, as aforesaid, were false and untrue, and the said defendants knew same were false and untrue at the time they made the same; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT SIXTEEN: And the Grand Jurors aforesaid, upon their oaths aforesaid do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are, and the true and full name of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Fliklen, John Muldoon, Mrs. J. O. Parsons, [31] E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded", which said scheme and artifice was in existence and continued in effect to and including the nineteenth day of March, 1931, more particularly set forth in the first count of this indictment, which said allegations are by reference made a part hereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 29th day of August, 1929, at

Phoenix, Arizona, as aforesaid, in said District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the person to whom the same was then and there directed, a certain letter, to-wit, a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to*n* one, Oliver *G*ry, Garden, Canyon Arizona, the said Oliver Fry, to whom said letter was so directed was then and there one of the persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

ARIZONA CLARENCE SAUNDERS
STORES, INC.,
700-701 Security Building.
Phoenix, Arizona.

August 29, 1929.

Dear Stockholder:

"It being the policy of this Company to keep its stockholders informed of the progress it is making, we are pleased to submit herewith information of interest.

"Stores No. 11-12-13-14-15-16 and 17 are

rapidly nearing completion. Number 11 will be opened Saturday, August 31st and Number 12 will open September 7th. Number 13 will open Friday, September 13th, which shows we are not the least bit superstitious, and the others numbered above will open at frequent intervals, just as soon as they can be rushed to completion. This policy will be followed until a Clarence Saunders Store is in operation in every town in the State where it appears profitable.

"We are more than gratified with the reception the public has given Clarence Saunders Stores. This is evidenced by the fact that more than eleven hundred people have purchased our securities, each one of them a satisfied purchaser and each of them contributing materially to the volume of business our stores are doing.

"Our Common stock is now being sold at $7.50 per share, this raise being justified by the very satisfactory condition of the Company, which has really exceeded our expectations. [32]

"We will continue these letters regularly as conditions warrant and we expect soon to make an announcement of prime importance to you.

"Respectfully yours,

ARIZONA CLARENCE SAUNDERS STORES, INC.

By: (Signed) A. E. SANDERS

President."

which said statements made by the defendants, in said letter, as aforesaid, were false and untrue, and the said defendants knew same were false and untrue at the time they made the same; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT SEVENTEEN: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and show that A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, William Greenbaum and Charles Greenbaum, late of the City of Phoenix, State and District of Arizona, whose true and full names are, and the true and full name of each of whom is, other than as herein stated to the grand jurors unknown, did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth from W. H. Forman, Willard Biggs, E. T. Bingenheimer, Pearl Gripp, Fred Bliklen, John Muldoon, Mrs. J. O. Parsons, E. L. and Mrs. R. V. Roberts and Monroe Young and from a large number of other persons, including the public generally, whose names because of their great number and the want of information on the part of the grand jurors are not given herein, all of which persons are hereinafter called "the persons to be defrauded" which said scheme and artifice was in existence and continued in effect to and including the nineteenth day

of March, 1931, more particularly set forth in the first count of this indictment, which allegations are by reference made a part hereof.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and show that said defendants, on the 21st day of July, 1930, at Phoenix, Arizona, aforesaid, in the District of Arizona, and within the jurisdiction of the United States and this Honorable Court, so having as aforesaid, devised the scheme and artifice, aforesaid, for the purpose and with the intent then and there on their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place and cause to be placed in the Post Office of the United States there, to be sent and delivered by the post office establishment of the United States to the persons to whom the same was then and there directed, a certain letter, to wit? a letter then and there enclosed in an envelope then and there bearing United States postage in the sum of two cents and the following return card, direction and address, to-wit: a letter addressed to one, E. L. and Mrs. R. V. Roberts, Box 323, Ajo, Arizona, the said E. L. and Mrs. R. V. Roberts, to whom said letter was so directed was then and there persons to be defrauded, as said defendants then and there well knew, and which said letter was and is of the following tenor, that is to say:

"UNITED CLARENCE SAUNDERS
STORES, INC.
305 South Second Avenue,
Phoenix, Arizona.

July 21, 1930.

Dear Stockholder:

"First, we wish to thank each and every one of you stockholders for the letters we have received from you expressing your wonderful confidence in the officials of your Company. Each day brings fresh letters, and this splendid cooperation is indeed gratifying to the officials of your company. [33]

"Naturally, as stockholders of the United Clarence Saunders Stores, Inc., you are doubtless pleased with the progress your Company has made. On January 26, 1929, our first store was opened, and since then eighteen additional stores have been opened, making a total of nineteen in the State. Saturday, July 26, another one of your Clarence Saunders stores will be opened in Tucson. Before the year of 1930 is over we certainly expect to have a great many stores scattered throughout the different points in the State where one can be profitably operated.

"It is very gratifying the way the public in general in the State of Arizona has acclaimed the Clarence Saunders Stores. Our volume of business is beyond any figure that we had anticipated, with each month showing a substan-

tial increase. You, no doubt, are aware that the Clarence Saunders stores in Arizona are home owned, home operated, and operated by Arizona Capital. We are proud to say that practically all the employees of your company here are Arizona people, and this policy to employ Arizona people has been maintained since the inception of our first store, and uppermost in our minds is the thought to GROW WITH ARIZONA.

"Bear in mind that you are a part of your Company and your cooperation is necessary at all times to make this Company a success. Idle rumors are afloat that have no foundation. If at any time, there is any doubt in your mind as to your Company, make your inquiry direct to the officials of your Company, who will at all times be glad to give you any information that you desire.

"Yours for success,

"UNITED CLARENCE SAUNDERS,
STORES, INC.
(Signed) K. L. VANATTA
aes;ml Vice President."

which said statements made by the defendants, in said letter, as aforesaid, were false and untrue, and the said defendants knew same were false and untrue at the time they made the same; contrary to the form of the statute in such case made and pro-

vided, and against the peace and dignity of the United States of America.

JOHN C. GUNG'L
United States Attorney
J. S. WHEELER
Assistant U. S. Attorney [34]

No. ------

UNITED STATES DISTRICT COURT
District of Arizona
----------Division

The United States of America
vs.
A. E. Sanders et al

INDICTMENT.

A true bill,
H. A. CLARK
Foreman.

Filed in open Court this------
day of ------A. D. 19

Clerk.

Bail, $----------

Witnesses
W. G. Means
Addie Driscoll
Mrs. Jennie Halpan
Fred Bliklen
Oliver Fry
Walter A Wood
J. M. Nixon

[Endorsed]: Filed FEB 28 1933 [35]

Minute Entry of

TUESDAY, FEBRUARY 28, 1933

November 1932 Term At Tucson

HONORABLE ALBERT M. SAMES, United States District Judge, presiding.

[Title of Cause.]

On motion of John C. Gung'l, Esquire, United States Attorney,

IT IS ORDERED that a Bench Warrant issue forthwith for the apprehension of each of the defendants herein and that the bond of each of said defendants be fixed in the penal sum of Twenty Five Thousand Dollars ($25,000.00). [36]

Minute Entry of

THURSDAY, MARCH 2, 1933

October 1932 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding.

[Title of Cause.]

Upon motion of Louise B. Whitney, Esquire, and with the consent of J. S. Wheeler, Esquire, Assistant United States Attorney,

IT IS ORDERED that the bond of each defendant herein, be reduced to the penal sum of Ten Thousand Dollars ($10,000.00) [37]

Minute Entry of

MONDAY, MARCH 6, 1933

October 1932 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding.

[Title of Cause.]

The defendants, Gus Greenbaum, Charles Greenbaum, and William Greenbaum, are present in person, with their counsel, A. B. Baker, Esquire. The defendant, A. E. Sanders, is president in person, with A. B. Baker, Esquire, who appears specially for said defendant.

The defendants are now duly arraigned; the Indictment is read to them and a copy thereof handed to each of said defendants. Each of said defendants pleads Not Guilty, with the privilege of withdrawing said pleas for the purpose of filing Demurrer, and

IT IS ORDERED that this case be continued to be set for trial. [38]

Minute Entry of

WEDNESDAY, OCTOBER 4, 1933

October 1933 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding.

[Title of Cause.]

This being the time heretofore fixed for trial setting, this case is now regularly called pursuant to notice to counsel. G. E. Wood, Esquire, and F. E. Flynn, Esquire, Assistant United States Attorneys, appear for the Government. Duane Bird, Esquire, and Messrs. Baker and Whitney, by L. B. Whitney, Esquire, appear as counsel for the Defendants.

Upon motion of said counsel,

IT IS ORDERED that this case be, and the same is hereby continued to be set for trial, after the legal matters have been disposed of. [39]

[Title of Court and Cause.]

MOTION OF GUS B. GREENBAUM TO QUASH INDICTMENT

COMES NOW the defendant Gus B. Greenbaum, by his attorneys, and moves that the indictment herein be quashed upon the following grounds and for the following reasons:

(1) That said indictment was not presented and returned to the Court as provided by law in that it was not presented to the Court in the presence of all of the members of the grand jury that found the same, one of said grand jurors, namely H. J. Peterson, having been unlawfully excused by the foreman of said grand jury and being not present in Court when said indictment was presented by the

foreman of said grand jury to the Court. A certified copy of the grand jury report (minute entry of February 28, 1933) is attached hereto and made a part of this motion. This motion is based on said grand jury report and the proceedings of said grand jury as shown by the records of this Court.

(2) That none of said counts charges a crime within the meaning of any law or statute of the United States of America.

(3) That none of said counts sets forth any facts which constitute an offense against the laws of the United States of [40] America.

(4) That the scheme or artifice alleged, or attempted to be alleged in each of said counts, does not constitute a fraudulent scheme or artifice, or indicate an intention or purpose to perpetrate a fraud.

(5) That in none of said counts are facts and circumstances well and sufficiently pleaded which constitute a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.

(6) That said counts do not state facts which constitute the offense charged with such clearness and certainty as to enable said defendant to prepare his defense or to avail himself of a conviction or acquittal in defense to a subsequent prosecution for the same alleged offense, nor do said counts advise said defendant of the evidence which will be adduced against him upon the trial of this cause.

(7) That said counts while alleging that said defendant named in said indictment devised and intended to devise a scheme or artifice for obtaining money and property by means of false and fraudulent pretenses, representations and promises, wholly fail to charge any certain scheme or artifice in any of said counts.

(8) That each and every count of said indictment is uncertain, illogical, vague ain indefinite and do not with sufficient particularity and accuracy set out any offense known to law.

(9) That the scheme or artifice to defraud alleged in said indictment, and in each and every count thereof, to have been devised by the defendant is not set forth with sufficient accuracy and particularity as to inform the defendant of the fraud charged against him. [41]

(10) That the allegations contained in the positive and negative averments of said indictment, and in each and every count thereof, are so contradictory, each of the other, as not to properly allege or describe a scheme or artifice to cheat or defraud.

(11) That said indictment, and each and every count thereof, in its description of the artifice or scheme to defraud alleges the attempted consummation of said scheme by means of an attempted promise of future performance.

(12) That no false or unlawful pretense, fraud, device or scheme is sufficiently and accurately set

out in said indictment, and until it is so pleaded an allegation that the Post Office Department of the "United States was used in furtherance of it, alleges no offense under the law.

(13) That the indictment, and each and every count thereof, is bad and duplictous, in that it charges in a single count the commission of more than one offense, contrary to the provisions of Section 1024, Revised Statutes of the United States.

(14) That the setting up of more than one offense in a single count does not enable the court or jury to deal intelligently with the charge and seriously handicaps the defendant in making his defense and may prevent him from pleading former acquittal or conviction.

(15) That in each of said counts of said indictment more than one separate and distinct offense is charged in that in each of said counts separate and distinct schemes or artifices are attempted to be alleged.

(16) That each of said counts in duplicitous in that separate and distinct offenses are attempted to be charged by the attempted allegations of separate and distinct schemes and artifices.

(17) That each and every count of said indictment fails to [42] state facts sufficient to constitute an offense against the laws of the United States.

(18) That there is no allegation in said indictment showing that this defendant had anything to do with the scheme or artifice of the defendant H. D. Sanders in organizing and incorporating under the Laws of the State of Arizona the Piggly-Wiggly Holding Corporation, or the changing of the name of said corporation to the U-Save Holding Corporation, which was thereafter engaged in business in the City of Los Angeles, State of California.

(19) That there is no allegation in said indictment that this defendant had anything to do with the scheme or artifice relating to the U-Save Holding Corporation in acquiring a majority of the capital stock of the United Sanders Stores, Inc., nor with the scheme and artifice relating to the moving of certain merchandise of the value of more than $100,000, from the warehouse of United Sanders Stores, Inc., of Phoenix, Tucson and Nogales, Arizona, to Los Angeles, California.

(20) That it cannot be ascertained from said indictment, or any count thereof, whether or not this defendant ever at any time mailed, or caused to be mailed, any letters, circulars or advertisements pertaining to the alleged fraudulent schemes set forth in each count of the indictment.

(21) That it cannot be ascertained from said indictment, or any count thereof, whether this defendant was at any time a stockholder or director,

or officer, of the corporations mentioned in said indictment.

(22) That in and by said counts of said indictment it appears that all of the defendants named therein could not be guilty of the offenses charged.

(23) That said counts are defective in that they plead conclusions of fact and of law.

(24) That the alleged scheme or artifice set forth in said [43] counts and each of them wholly fails to disclose such a scheme or artifice as is reasonably calculated to defraud.

(25) That the alleged use of the postoffice establishment of the United States of America by said defendant, in the manner and form as alleged in each and all of the said counts, affirmatively establishes by the allegations of the indictment and the several counts thereof in respect thereto that the same was not and could not have been used for the purpose of executing any such schemes or artifices as is attempted to be alleged in said several counts.

(26) That separate and distinct offenses not capable of being united in the same indictment are improperly joined in said indictment.

(27) That separate and distinct offenses not capable of being united in the same count are improperly joined in each and every count of said indictment.

(28) That there is a misjoinder of offenses in said indictment and in each and every count thereof.

(29) That there is a misjoinder of parties defendant in said indictment and in each and every count thereof.

WHEREFORE, defendant prays that said indictment be quashed and that he be dismissed and discharged therefrom.

BAKER & WHITNEY
LAWRENCE L. HOWE

Attorneys for Defendant Gus B. Greenbaum 703 Luhrs Tower Phoenix, Arizona.

Received copy this 4th day of October, 1933.

CLIFTON MATHEWS
United States District Attorney. [44]

In the United States District Court
for the District of Arizona

TUESDAY, FEBRUARY 28, 1933

November 1932 Term At Tucson

HONORABLE ALBERT M. SAMES, United States District Judge, presiding.

MISC. GRAND JURY REPORT

Comes now the Grand Jury duly empaneled and sworn at this term of Court, all members present except H. J. Peterson. Whereupon, their Foreman reports that he has excused said Grand Juror this

date and it is ordered that the said H. J. Peterson be excused from being present at this report. Thereupon said Grand Jury by and through their Foreman report that they have found seventy-three True Bills and that twelve or more of their number have concurred in the finding of said indictments, and thirty of said indictments charging offenses committed in the Tucson Division of this Court are now presented to the Court in the presence of the Grand Jury by their Foreman and thereupon filed by the Clerk and numbered C-6508 Tucson and C-6510 Tucson to C-6538 Tucson, inclusive; and ten of said indictments charging offenses committed in the Globe Division of this Court are presented to the Court in the presence of the Grand Jury by their Foreman, and thereupon it is ordered by the Court that said indictments be filed and docketed in the Globe Division of this Court and said indictments are thereupon filed by the Clerk and numbered C-1369 Globe to C-1378 Globe, inclusive; and thirty-three of said indictments charging offenses committed in the Phoenix Division of this Court are presented to the Court in the presence of the Grand Jury by their Foreman, and Thereupon it is ordered by the Court that said indictments be filed and docketed in the Phoenix Division of this Court and said indictments are thereupon filed by the Clerk and numbered C-4848 Phoenix to C-4870 Phoenix, inclusive, and C-4872 Phoenix to C-4881 Phoenix, inclusive.

Said Grand Jury further report that they have ignored [45] the following matters:

GJ-6086 Tucson, United States of America vs. Ethel Clemens

GJ-6050 Tucson, United States of America vs. Ysidro Marquez

GJ-6118 Tucson, United States of America vs. Pedro Orozco

GJ-3644 Phoenix, United States of America vs. Panfila Ortiz

Whereupon, said Grand Jury is excused subject to call and the further order of the Court.

Thereupon, J. S. Wheeler, Esquire, Assistant United States Attorney, presents to the Court an indictment against Jose Jesus Reyes, and represents to the Court that said indictment was voted on by the ground jury and considered by all members thereof and found to be a True Bill, more than twelve of their number having voted to find a True Bill in said case. John C. Gung'l, Esquire, United States Attorney, presents to the Court an indictment against M. C. Little, and makes a like representation to the Court as to said indictment and exhibits the minutes of said Grand Jury, and it appearing to the Court from said minutes that more than twelve Grand Jurors in each of said cases voted for True Bills therein and it further appearing to the Court that said indictments have been endorsed by the Foreman of the Grand Jury as True Bills, it is ordered that the indictment against Jose Jesus

Reyes be numbered C-4871 Phoenix and filed and docketed in the Phoenix Division of this Court and that the indictment against M. C. Little be numbered C-6509 Tucson and filed and docketed in the Tucson Division of this Court. [46]

The United States District Court for the District of *A*rizona

United States of America
District of Arizona—ss.

I, J. LEE BAKER, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect, and complete copy of GRAND JURY REPORT (Minute entry of February 28, 1933) as the same appears from the original record remaining in my office.

WITNESS my hand and the seal of said Court this 13th day of March, 1933.

[Seal] J. LEE BAKER,
Clerk,

By WM. H. LOVELESS
Deputy.

[Endorsed]: Filed OCT 4 1933 [47]

[Title of Court and Cause.]

MOTION OF CHARLES GREENBAUM TO QUASH INDICTMENT

COMES NOW the defendant Charles Greenbaum, by his attorneys, and moves that the indictment herein be quashed upon the following grounds and for the following reasons:

(1) That said indictment was not presented and returned to the Court as provided by law in that it was not presented to the Court in the presence of all of the members of the grand jury that found the same, one of said grand jurors, namely, H. J. Peterson, having been unlawfully excused by the foreman of said grand jury and being not present in Court when said indictment was presented by the foreman of said grand jury to the court. A certified copy of the grand jury report (Minute Entry of February 28, 1933) is attached hereto and made a part of this motion. This motion is based on said grand jury report and the proceedings of said grand jury as shown by the records of this Court.

(2) That none of said counts charges a crime within the meaning of any law or statute of the United States of America.

(3) That none of said counts sets forth any facts which constitute an offense against the laws of the United States of America. [48]

(4) That the scheme or artifice alleged, or attempted to be alleged in each of said counts, does

not constitute a fraudulent scheme or artifice, or indicate an intention or purpose to perpetuate a fraud.

(5) That in none of said counts are facts and circumstances well and sufficiently pleaded which constitute a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.

(6) That said counts do not state facts which constitute the offense charged with such clearness and certainty as to enable said defendant to prepare his defense or to avail himself of a conviction or acquittal in defense to a subsequent prosecution for the same alleged offense, nor do said counts advise said defendant of the evidence which will be adduced against him upon the trial of this cause.

(7) That said counts while alleging that said defendant named in said indictment devised and intended to devise a scheme or artifice for obtaining money and property by means of false and fraudulent pretenses, representations and promises, wholly fail to charge any certain scheme or artifice in any of said counts.

(8) That each and every count of said indictment is uncertain, illogical, vague and indefinite and do not with sufficient particularity and accuracy set out any offense known to law.

(9) That the scheme or artifice to defraud alleged in said indictment, and in each and every

count thereof, to have been devised by the defendant is not set forth with sufficient accuracy and particularity as to inform the defendant of the fraud charged against him.

(10) That the allegations contained in the positive and negative averments of said indictment, and in each and every count [49] thereof, are so contradictory, each of the other, as not to properly allege or describe a scheme or artifice to cheat or defraud.

(11) That said indictment, and each and every count thereof, in its description of the artifice or scheme to defraud alleges the attempted consummation of said scheme by means of an attempted promise of future performance.

(12) That no false or unlawful pretense, fraud, device or scheme is sufficiently and accurately set out in said indictment, and until it is so pleaded an allegation that the Post Office Department of the United States was used in furtherance of it, alleges no offense under the law.

(13) That the indictment, and each and every count thereof, is bad and duplicitous, in that it charges in a single count the commission of more than one offense, contrary to the provisions of Section 1024, Revised Statutes of the United States.

(14) That the setting up of more than one offense in a single count does not enable the court or jury to deal intelligently with the charge and seri-

ously handicaps the defendant in making his defense and may prevent him from pleading former acquittal or conviction.

(15) That in each of said counts of said indictment more than one separate and distinct offense is charged in that each of said counts separate and distinct schemes or artifices are attempted to be alleged.

(16) That each of said counts is duplicitous in that separate and distinct offenses are attempted to be charged by the attempted allegations of separate and distinct schemes and artifices.

(17) That each and every count of said indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

(18) That there is no allegation in said indictment showing [50] that this defendant had anything to do with the scheme or artifice of the defendant H. D. Sanders in organizing and incorporating under the laws of the State of Arizona the Piggly-Wiggly Holding Corporation, or the changing of the name of said corporation to the U-Save Holding Corporation, which was thereafter engaged in business in the City of Los Angeles, State of California.

(19) That there is no allegation in said indictment that this defendant had anything to do with the scheme or artifice relating to the U-Save Holding Corporation in acquiring a majority of the

capital stock of United Sanders Stores, Inc., nor with the scheme and artifice relating to the moving of certain merchandise of the value of more than $100,000.00 from the warehouse of United Sanders Stores, Inc., of Phoenix, Tucson and Nogales, Arizona, to Los Angeles, California.

(20) That it cannot be ascertained from said indictment, or any count thereof, whether or not this defendant ever at any time, mailed, or caused to be mailed, any letters, circulars or advertisements pertaining to the alleged fraudulent schemes set forth in each count of the indictment.

(21) That it cannot be ascertained from said indictment, or any count thereof, whether this defendant was at any time a stockholder or director, or officer, of the corporations mentioned in said indictment.

(22) That in and by said counts of said indictment it appears that all of the defendants named therein could not be guilty of the offenses charged.

(23) That said counts are defective in that they plead conclusions of fact and of law.

(24) That the alleged scheme or artifice set forth in said counts and each of them wholly fails to disclose such a scheme or artifice as is reasonably calculated to defraud. [51]

(25) That the alleged use of the postoffice establishment of the United States of America by said

defendant, in the manner and form as alleged in each and all of the said counts, affirmatively establishes by the allegations of the indictment and the several counts thereof in respect thereto that the same was not and could not have been used for the purpose of executing any such schemes or artifices as is attempted to be alleged in said several counts.

(26) That separate and distinct offenses not capable of being united in the same indictment are improperly joined in said indictment.

(27) That separate and distinct offenses not capable of being united in the same count are improperly joined in each and every count of said indictment.

(28) That there is a misjoinder of offenses in said indictment and in each and every count thereof.

(29) That there is a misjoinder of parties defendant in said indictment and in each and every count thereof.

WHEREFORE, defendant prays that said indictment be quashed and that he be dismissed and discharged therefrom.

BAKER & WHITNEY
LAWRENCE L. HOWE
Attorneys for Defendant Charles Greenbaum 703 Luhrs Tower Phoenix Arizona

Received copy this 4th day of October, 1933.
CLIFTON MATHEWS
United States District Attorney. [52]

In the United States District Court
For the District of Arizona

TUESDAY, FEBRUARY 28, 1933

November 1932 Term At Tucson

HONORABLE ALBERT M. SAMES, United States District Judge, Presiding.

[Title of Cause.]

MISC. GRAND JURY REPORT

Comes now the Grand Jury duly empaneled and sworn at this term of Court, all members present except H. J. Peterson. Whereupon, their Foreman reports that he has excused said Grand Juror this date and it is ordered that the said H. J. Peterson be excused from being present at this report. Thereupon said Grand Jury by and through their Foreman report that they have found seventy-three True Bills and that twelve or more of their number have concurred in the finding of said indictments, and thirty of said indictments charging offenses committed in the Tucson Division of this Court are now presented to the Court in the presence of the Grand Jury by their Foreman and thereupon filed by the Clerk and numbered C-6508 Tucson and C-6510 Tucson to C-6538 Tucson, inclusive; and ten of said indictments charging offenses committed in the Globe Division of this Court are presented to the Court in the presence of the Grand Jury by their Foreman, and there-

upon it is ordered by the Court that said indictments be filed and docketed in the Globe Division of this Court and said indictments are thereupon filed by the Clerk and numbered C-1369 Globe to C-1378 Globe, inclusive; and thirty-three of said indictments charging offenses committed in the Phoenix Division of this Court are presented to the Court in the presence of the Grand Jury by their Foreman, and Thereupon it is ordered by the Court that said indictments be filed and docketed in the Phoenix Division of this Court and said indictments are thereupon filed by the Clerk and numbered C-4848 Phoenix to C-4870 Phoenix, inclusive, and C-4872 Phoenix to C-4881 Phoenix, inclusive.

Said Grand Jury further report that they have ignored [53] the following matters:

GJ-6086 Tucson, United States of America vs. Ethel Clemens

GJ-6060 Tucson, United States of America vs. Ysidro Marquez

GJ-6118 Tucson, United States of America vs. Pedro Orozco

GJ-3644 Phoenix, United States of America vs. Panfila Ortiz

Whereupon, said Grand Jury is excused subject to call and the further order of the Court.

Thereupon, J. S. Wheeler, Esquire, Assistant United States Attorney, presents to the Court an

indictment against Jose Jesus Reyes, and represents to the Court that said indictment was voted on by the grand jury and considered by all members thereof and found to be a True Bill, more than twelve of their number having voted to find a True Bill in said case. John C. Gung'l, Esquire, United States Attorney, presents to the Court an indictment against M. C. Little, and makes a like representation to the Court as to said indictment and exhibits the minutes of said Grand Jury, and it appearing to the Court from said minutes that more than twelve Grand Jurors in each of said cases voted for True Bills therein and it further appearing to the Court that said indictments have been endorsed by the Foreman of the Grand Jury as True Bills, it is ordered that the indictment against Jose Jesus Reyes be numbered C-4871 Phoenix and filed and docketed in the Phoenix Division of this Court and that the indictment against M. C. Little be numbered C-6509 Tucson and filed and docketed in the Tucson Division of this Court. [54]

The United States District Court For
The District of Arizona.

United States of America,
District of Arizona.—ss.

I, J. LEE BAKER, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true,

perfect, and complete copy of GRAND JURY REPORT (Minute entry of February 28, 1933) as the same appears from the original record remaining in my office.

WITNESS my hand and the seal of said Court this 13th day of March, 1933.

[Seal] J. LEE BAKER,
Clerk

By WM. H. LOVELESS
Deputy.

[Endorsed]: Filed Oct 4 1933 [55]

[Title of Court and Cause.]

MOTION OF WILLIAM GREENBAUM TO QUASH INDICTMENT.

COMES NOW the defendant William Greenbaum, by his attorneys, and moves that the indictment herein be quashed upon the following grounds and for the following reasons:

(1) That said indictment was not presented and returned to the Court as provided by law in that it was not presented to the Court in the presence of all of the members of the grand jury that found the same, one of said grand jurors, namely, H. J. Peterson, having been unlawfully excused by the foreman of said grand jury and being not present in Court when said indictment was presented by

the foreman of said grand jury to the Court. A certified copy of the grand jury report (minute entry of February 28, 1933) is attached hereto and made a part of this motion. This motion is based on said grand jury report and the proceedings of said grand jury as shown by the records of this Court.

(2) That none of said counts charges a crime within the meaning of any law or statute of the United States of America.

(3) That none of said counts sets forth any facts which constitute an offense against the laws of the United States of [56] America.

(4) That the scheme or artifice alleged, or attempted to be alleged in each of said counts, does not constitute a fraudulent scheme or artifice, or indicate an intention or purpose to perpetrate a fraud.

(5) That in none of said counts are facts and circumstances well and sufficiently pleaded which constitute a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.

(6) That said counts do not state facts which constitute the offense charged with such clearness and certainty as to enable said defendant to prepare his defense or to avail himself of a conviction or acquittal in defense to a subsequent prosecution

for the same alleged offense, nor do said counts advise said defendant of the evidence which will be adduced against him upon the trial of this cause.

(7) That said counts while alleging that said defendant named in said indictment devised and intended to devise a scheme or artifice for obtaining money and property by means of false and fraudulent pretenses, representations and promises, wholly fail to charge any certain scheme or artifice in any of said counts.

(8) That each and every count of said indictment is uncertain, illogical, vague and indefinite and do not with sufficient particularity and accuracy set out any offense known to law.

(9) That the scheme or artifice to defraud alleged in said indictment, and in each and every count thereof, to have been devised by the defendant is not set forth with sufficient accuracy and particularity as to inform the defendant of the fraud charged against him. [57]

(10) That the allegations contained in the positive and negative averments of said indictment, and in each and every count thereof, are so contradictory, each of the other, as not to properly allege or describe a scheme or artifice to cheat or defraud.

(11) That said indictment, and each and every count thereof, in its description of the artifice or scheme to defraud alleges the attempted consumma-

tion of said scheme by means of an attempted promise of future performance.

(12) That no false or unlawful pretense, fraud, device or scheme is sufficiently and accurately set out in said indictment, and until it is so pleaded an allegation that the Post Office Department of the United States was used in furtherance of it, alleges no offense under the law.

(13) That the indictment, and each and every count thereof, is bad and duplicitous, in that it charges in a single count the commission of more than one offense, contrary to the provisions of Section 1024, Revised Statutes of the United States.

(14) That the setting up of more than one offense in a single count does not enable the court or jury to deal intelligently with the charge and seriously handicaps the defendant in making his defense and may prevent him from pleading former acquittal or conviction.

(15) That in each of said counts of said indictment more than one separate and distinct offense is charged in that in each of said counts separate and distinct schemes or artifices are attempted to be alleged.

(16) That each of said counts is duplicitous in that separate and distinct offenses are attempted to be charged by the attempted allegations of separate and distinct schemes and artifices.

(17) That each and every count of said indictment fails to [58] state facts sufficient to constitute an offense against the laws of the United States.

(18) That there is no allegation in said indictment showing that this defendant had anything to do with the scheme or artifice of the defendant H. D. Sanders in organizing and incorporating under the Laws of the State of Arizona the Piggly-Wiggly Holding Corporation, or the changing of the name of said corporation to the U-Save Holding Corporation, which was thereafter engaged in business in the City of Los Angeles, State of California.

(19) That there is no allegation in said indictment that this defendant had anything to do with the scheme or artifice relating to the U-Save Holding Corporation in acquiring a majority of the capital stock of United Sanders Stores, Inc., nor with the scheme and artifice relating to the moving of certain merchandise of the value of more than $100,000.00 from the warehouse of United Sanders Stores, Inc., of Phoenix, Tucson and Nogales, Arizona, to Los Angeles, California.

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(21) That it cannot be ascertained from said indictment, or any count thereof, whether this defendant was at any time a stockholder or director, or officer, of the corporations mentioned in said indictment.

(22) That in and by said counts of said indictment it appears that all of the defendants named therein could not be guilty of the offenses charged.

(23) That said counts are defective in that they plead conclusions of fact and of law.

(24) That the alleged scheme or artifice set forth in said [59] counts and each of them wholly fails to disclose such a scheme or artifice as is reasonably calculated to defraud.

(25) That the alleged use of the postoffice establishment of the United States of Arizona by said defendant, in the manner and form as alleged in each and all of the said counts, affirmatively establishes by the allegations of the indictment and the several counts thereof in respect thereto that the same was not and could not have been used for the purpose of executing any such schemes or artifices as is attempted to be alleged in said several counts.

(26) That separate and distinct offenses not capable of being united in the same indictment are improperly joined in said indictment.

(27) That separate and distinct offenses not capable of being united in the same count are im-

properly joined in each and every count of said indictment.

(28) That there is a misjoinder of offenses in said indictment and in each and every count thereof.

(29) That there is a misjoinder of parties defendant in said indictment and in each and every count thereof.

WHEREFORE, defendant prays that said indictment be quashed and that he be dismissed and discharged therefrom.

BAKER & WHITNEY
LAWRENCE L. HOWE
Attorneys for Defendant William Greenbaum 703 Luhrs Tower Phoenix Arizona

Received copy this 4th day of October, 1933.
CLIFTON MATHEWS
United States District Attorney. [60]

In the United States District Court for the District of Arizona.

TUESDAY, FEBRUARY 28, 1933

November 1932 Term At Tucson

HONORABLE ALBERT M. SAMES, United States District Judge, Presiding.

MISC. GRAND JURY REPORT.

Comes now the Grand Jury duly empaneled and sworn at this term of Court, all members present

except H. J. Peterson. Whereupon, their Foreman reports that he has excused said Grand Juror this date and it is ordered that the said H. J. Peterson be excused from being present at this report. Thereupon said Grand Jury by and through their Foreman report that they have found seventy-three True Bills and that twelve or more of their number have concurred in the finding of said indictments, and thirty of said indictments charging offenses committed in the Tucson Division of this Court are now presented to the Court in the presence of the Grand Jury by their Foreman and thereupon filed by the Clerk and numbered C-6508 Tucson and C-6510 Tucson to C-6538 Tucson, inclusive; and ten of said indictments charging offenses committed in the Globe Division of this Court are presented to the Court in the presence of the Grand Jury by their Foreman, and thereupon it is ordered by the Court that said indictments be filed and docketed in the Globe Division of this Court and said indictments are thereupon filed by the Clerk and numbered C-1369 Globe to C-1378 Globe, inclusive; and thirty-three of said indictments charging offenses committed in the Phoenix Division of this Court are presented to the Court in the presence of the Grand Jury by their Foreman, and Thereupon it is ordered by the Court that said indictments be filed and docketed in the Phoenix Division of this Court and said indictments are thereupon filed by the Clerk and numbered C-4848 Phoenix to C-4870

Phoenix, inclusive, and C-4872 Phoenix to C-4881 Phoenix, inclusive.

Said Grand Jury further report that they have ignored [61] the following matters:

GJ-6086 Tucson, United States of America vs. Ethel Clemens

GJ-6050 Tucson, United States of America vs. Ysidro Marquez

GJ-6118 Tucson, United States of America vs. Pedro Orozco

GJ-3644 Phoenix, United States of America vs. Panfila Ortiz

Whereupon, said Grand Jury is excused subject to call and the further order of the Court.

Thereupon, J. S. Wheeler, Esquire, Assistant United States Attorney, presents to the Court an indictment against Jose Jesus Reyes, and represents to the Court that said indictment was voted on by the grand jury and considered by all members thereof and found to be a True Bill, more than twelve of their number having voted to find a True Bill in said case. John C. Gung'l, Esquire, United States Attorney, presents to the Court an indictment against M. C. Little, and makes a like representation to the Court as to said indictment and exhibits the minutes of said Grand Jury, and it appearing to the Court from said minutes that more than twelve Grand Jurors in each of said cases voted for True Bills therein and it further appearing to the Court that said indictments have

been endorsed by the Foreman of the Grand Jury as True Bills, it is ordered that the indictment against Jose Jesus Reyes be numbered C-4871 Phoenix and filed and docketed in the Phoenix Division of this Court and that the indictment against M. C. Little be numbered C-6509 Tucson and filed and docketed in the Tucson Division of this Court. [62]

The United States District Court For
The District of Arizona.

United States of America,
District of Arizona.—ss:

I, J. LEE BAKER, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect, and complete copy of GRAND JURY REPORT (Minute entry of February 28, 1933) as the same appears from the original record remaining in my office.

WITNESS my hand and the seal of said Court this 13th day of March, 1933.

[Seal] J. LEE BAKER,
Clerk
By WM. H. LOVELESS,
Deputy.

[Endorsed]: Filed Oct 4 1933 [63]

[Title of Court and Cause.]

SEPARATE DEMURRER OF GUS B. GREENBAUM TO THE INDICTMENT

COMES NOW Gus B. Greenbaum, one of the defendants above named, by his attorneys, and by leave of Court first had and obtained withdraws his plea of not guilty, and demurs to the indictment found herein, and separately as to each and every count thereof, and for grounds of demurrer alleges:

(a) That none of said counts charges a crime within the meaning of any law or statute of the United States of America.

(b) That none of said counts sets forth any facts which constitute an offense against the laws of the United States of America.

(c) That the scheme or artifice alleged, or attempted to be alleged in each of said counts, does not constitute a fraudulent scheme or artifice, or indicate an intention or purpose to perpetrate a fraud.

(d) That in none of said counts are facts and circumstances well and sufficiently pleaded which constitute a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.

(e) That said counts do not state facts which constitute [64] the offense charged with such clear-

ness and certainty as to enable said defendant to prepare his defense or to avail himself of a conviction or acquittal in defense to a subsequent prosecution for the same alleged offense, nor do said counts advise said defendant of the evidence which will be adduced against him upon the trial of this cause.

(f) That said counts while alleging that said defendant named in said indictment devised and intended to devise a scheme or artifice for obtaining money and property by means of false and fraudulent pretenses, representations and promises, wholly fail to charge any certain scheme or artifice in any of said counts.

(g) That each and every count of said indictment is uncertain, illogical, vague and indefinite and do not with sufficient particularity and accuracy set out any offense known to law.

(h) That the scheme or artifice to defraud alleged in said indictment, and in each and every count thereof, to have been devised by the defendant is not set forth with sufficient accuracy and particularity as to inform the defendant of the fraud charged against him.

(i) That the allegations contained in the positive and negative averments of said indictment, and in each and every count thereof, are so contradictory, each of the other, as not to properly allege or describe a scheme or artifice to cheat or defraud.

(j) That said indictment, and each and every count thereof, in its description of the artifice or scheme to defraud alleges the attempted consummation of said scheme by means of an attempted promise of future performances.

(k) That no false or unlawful pretense, fraud, device or [65] scheme is sufficiently and accurately set out in said indictment, and until it is so pleaded an allegation that the Post Office Department of the United States was used in furtherance of it, alleges no offense under the law.

(l) That the indictment, and each and every count thereof, is bad and duplicitous, in that it charges in a single count the commission of more than one offense, contrary to the provisions of Section 1024, Revised Statutes of the United States.

(m) That the setting up of more than one offense in a single count does not enable the Court or jury to deal intelligently with the charge and seriously handicaps the defendant in making his defense and may prevent him from pleading former acquittal or conviction.

(n) That in each of said counts of said indictment more than one separate and distinct offense is charged in that in each of said counts separate and distinct schemes or artifices are attempted to be alleged.

(o) That each of said counts is duplicitous in that separate and distinct offenses are attempted

to be charged by the attempted allegation of separate and distinct schemes and artifices.

(p) That each and every count of said indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

(q) That there is no allegation in said indictment showing that this defendant had anything to do with the scheme or artifice of the defendant H. D. Sanders in organizing and incorporating under the laws of the State of Arizona the Piggly-Wiggly Holding Corporation, or the changing of the name of said corporation to the U-Save Holding Corporation, which was thereafter engaged in business in the City of Los Angeles, State of California.

(r) That there is no allegation in said indictment that [66] this defendant had anything to do with the scheme or artifice relating to the U-Save Holding Corporation in acquiring a majority of the capital stock of United Sanders Stores, Inc., nor with the schemes and artifice relating to the moving of certain merchandise of the value of more than $100,000.00 from the warehouse of United Sanders Stores, Inc., of Phoenix, Tucson and Nogales, Arizona, to Los Angeles, California.

(s) That it cannot be ascertained from said indictment, or any count thereof, whether or not this defendant ever at any time mailed, or caused to be mailed, any letters, circulars, or advertisements pertaining to the alleged fraudulent schemes set forth in each count of the indictment.

(t) That it cannot be ascertained from said indictment, or any count thereof, whether this defendant was at any time a stockholder or director, or officer, of the corporation mentioned in said indictment, or either thereof.

(u) That in and by said counts of said indictment it appears that all of the defendants named therein could not be guilty of the offenses charged.

(v) That said counts are defective in that they plead conclusions of fact and of law.

(w) That the alleged scheme or artifice set forth in said counts and each of them wholly fails to disclose such a scheme or artifice as is reasonably calculated to defraud.

(x) That the alleged use of the postoffice establishment of the United States of America by said defendant, in the manner and form as alleged in each and all of the said counts, affirmatively establishes by the allegations of the indictment and the several counts thereof in respect thereto that the same was not and could not have been used for the purpose of executing [67] any such schemes or artifices as is attempted to be alleged in said several counts.

(y) That separate and distinct offenses not capable of being united in the same indictment are improperly joined in said indictment.

(z) That separate and distinct offenses not capable of being united in the same count are

improperly joined in each and every count of said indictment.

(aa) That there is a misjoinder of offenses in said indictment and in each and every count thereof.

(bb) That there is a misjoinder of parties defendant in said indictment and in each and every count thereof.

WHEREFORE, this defendant prays that said indictment and each and every count thereof, be adjudged insufficient; that this demurrer be sustained; and that this defendant be dismissed and discharged.

BAKER & WHITNEY
LAWRENCE L. HOWE

Attorneys for Defendant Gus. B. Greenbaum 703 Luhrs Tower, Phoenix, Arizona.

Received copy this 4th day of October, 1933.
CLIFTON MATHEWS
United States District Attorney

[Endorsed]: FILED OCT 4 1933 [68]

[Title of Court and Cause.]

SEPARATE DEMURRER OF CHARLES GREENBAUM TO THE INDICTMENT

COMES NOW Charles Greenbaum, one of the defendants above named, by his attorneys, and by

leave of Court first had and obtained withdraws his plea of not guilty, and demurs to the indictment found herein, and separately as to each and every count thereof, and for grounds of demurrer alleges:

(a) That none of said counts charges a crime within the meaning of any law or statute of the United States of America.

(b) That none of said counts sets forth any facts which constitute an offense against the laws of the United States of America.

(c) That the scheme or artifice alleged, or attempted to be alleged in each of said counts, does not constitute a fraudulent scheme or artifice, or indicate an intention or purpose to perpetrate a fraud.

(d) That in none of said counts are facts and circumstances well and sufficiently pleaded which constitute a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.

(e) That said counts do not state facts which constitute [69] the offense charged with such clearness and certainty as to enable said defendant to prepare his defense or to avail himself of a conviction or acquittal in defense to a subsequent prosecution for the same alleged offense, nor do said counts advise said defendant of the evidence

which will be adduced against him upon the trial of this cause.

(f) That said counts while alleging that said defendant named in said indictment devised and intended to devise a scheme or artifice for obtaining money and property by means of false and fraudulent pretenses, representations and promises, wholly fail to charge any certain scheme or artifice in any of said counts.

(g) That each and every count of said indictment is uncertain, illogical, vague and indefinite and do not with sufficient particularity and accuracy set out any offense known to law.

(h) That the scheme or artifice to defraud alleged in said indictment, and in each and every count thereof, to have been devised by the defendant is not set forth with sufficient accuracy and particularity as to inform the defendant of the fraud charged against him.

(i) That the allegations contained in the positive and negative averments of said indictment, and in each and every count thereof, are so contradictory, each of the other, as not to properly allege or describe a scheme or artifice to cheat or defraud.

(j) That said indictment, and each and every count thereof, in its description of the artifice or scheme to defraud alleges the attempted consummation of said scheme by means of an attempted promise of future performance.

(k) That no false or unlawful pretense, fraud, device or [70] scheme is sufficiently and accurately set out in said indictment, and until it is so pleaded an allegation that the Post Office Department of the United States was used in furtherance of it, alleges no offense under the law.

(l) That the indictment, and each and every count thereof, is bad and duplicitous, in that it charges in a single count the commission of more than one offense, contrary to the provisions of Section 1024, Revised Statutes of the United States.

(m) That the setting up of more than one offense in a single count does not enable the Court or jury to deal intelligently with the charge and seriously handicaps the defendant in making his defense and may prevent him from pleading former acquittal or conviction.

(n) That in each of said counts of said indictment more than one separate and distinct offense is charged in that in each of said counts separate and distinct schemes or artifices are attempted to be alleged.

(o) That each of said counts is duplicitous in that separate and distinct offenses are attempted to be charged by the attempted allegation of separate and distinct schemes and artifices.

(p) That each and every count of said indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

(q) That there is no allegation in said indictment showing that this defendant had anything to do with the scheme or artifice of the defendant H. D. Sanders in organizing and incorporating under the laws of the State of Arizona the Piggly-Wiggly Holding Corporation, or the changing of the name of said corporation to the U-Save Holding Corporation, which was thereafter engaged in business in the City of Los Angeles, State of California.

(r) That there is no allegation in said indictment that [71] this defendant had anything to do with the scheme or artifice relating to the U-Save Holding Corporation in acquiring a majority of the capital stock of United Sanders Stores, Inc., nor with the schemes and artifice relating to the moving of certain merchandise of the value of more than $100,000.00 from the warehouse of United Sanders Stores, Inc., of Phoenix, Tucson and Nogales, Arizona, to Los Angeles, California.

(s) That it cannot be ascertained from said indictment, or any count thereof, whether or not this defendant ever at any time mailed, or caused to be mailed, any letters, circulars, or advertisements pertaining to the alleged fraudulent schemes set forth in each count of the indictment.

(t) That it cannot be ascertained from said indictment, or any count thereof, whether this defendant was at any time a stockholder or director, or officer, of the corporations mentioned in said indictment, or either thereof.

(u) That in and by said counts of said indictment it appears that all of the defendants named therein could not be guilty of the offenses charged.

(v) That said counts are defective in that they plead conclusions of fact and of law.

(w) That the alleged scheme or artifice set forth in said counts and each of them wholly fails to disclose such a scheme or artifice as is reasonably calculated to defraud.

(x) That the alleged use of the postoffice establishment of the United States of America by said defendant, in the manner and form as alleged in each and all of the said counts, affirmatively establishes by the allegations of the indictment and the several counts thereof in respect thereto that the same was not and could not have been used for the purpose of executing [72] any such schemes or artifices as is attempted to be alleged in said several counts.

(y) That separate and distinct offenses not capable of being united in the same indictment are improperly joined in said indictment.

(z) That separate and distinct offenses not capable of being united in the same count are improperly joined in each and every count of said indictment.

(aa) That there is a misjoinder of offenses in said indictment and in each and every count thereof.

(bb) That there is a misjoinder of parties defendant in said indictment and in each and every count thereof.

WHEREFORE, this defendant prays that said indictment and each and every count thereof, be adjudged insufficient; that this demurrer be sustained; and that this defendant be dismissed and discharged.

BAKER & WHITNEY
LAWRENCE L. HOWE

Attorneys for Defendant Charles Greenbaum 703 Luhrs Tower, Phoenix, Arizona.

Received copy this 4th day of October, 1933.
CLIFTON MATHEWS
United States District Attorney

[Endorsed]: FILED OCT. 4 1933 [73]

[Title of Court and Cause.]

SEPARATE DEMURRER OF WILLIAM GREENBAUM TO THE INDICTMENT

COMES NOW William Greenbaum, one of the defendants above named, by his attorneys, and by leave of Court first had and obtained withdraws his plea of not guilty, and demurs to the indictment found herein, and separately as to each and every count thereof, and for grounds of demurrer alleges:

(a) That none of said counts charges a crime within the meaning of any law or statute of the United States of America.

(b) That none of said counts sets forth any facts which constitute an offense against the laws of the United States of America.

(c) That the scheme or artifice alleged, or attempted to be alleged in each of said counts, does not constitute a fraudulent scheme or artifice, or indicate an intention or purpose to perpetrate a fraud.

(d) That in none of said counts are facts and circumstances well and sufficiently pleaded which constitute a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.

(e) That said counts do not state facts which constitute [74] the offense charged with such clearness and certainty as to enable said defendant to prepare his defense or to avail himself of a conviction or acquittal in defense to a subsequent prosecution for the same alleged offense, nor do said counts advise said defendant of the evidence which will be adduced against him upon the trial of this cause.

(f) That said counts while alleging that said defendant named in said indictment devised and intended to devise a scheme or artifice for obtaining money and property by means of false and fraudulent pretenses, representations and promises, wholly

fail to charge any certain scheme or artifice in any of said counts.

(g) That each and every count of said indictment is uncertain, illogical, vague and indefinite and do not with sufficient particularity and accuracy set out any offense known to law.

(h) That the scheme or artifice to defraud alleged in said indictment, and in each and every count thereof, to have been devised by the defendant is not set forth with sufficient accuracy and particularity as to inform the defendant of the fraud charged against him.

(i) That the allegations contained in the positive and negative averments of said indictment, and in each and every count thereof, are so contradictory, each of the other, as not to properly allege or describe a scheme or artifice to cheat or defraud.

(j) That said indictment, and each and every count thereof, in its description of the artifice or scheme to defraud alleges the attempted consummation of said scheme by means of an attempted promise of future performance.

(k) That no false or unlawful pretense, fraud, device or [75] scheme is sufficiently and accurately set out in said indictment, and until it is so pleaded an allegation that the Post Office Department of the United States was used in furtherance of it, alleges no offense under the law.

(l) That the indictment, and each and every count thereof, is bad and duplicitous, in that it charges in a single count the commission of more than one offense, contrary to the provisions of Section 1024, Revised Statutes of the United States.

(m) That the setting up of more than one offense in a single count does not enable the Court or jury to deal intelligently with the charge and seriously handicaps the defendant in making his defense and may prevent him from pleading former acquittal or conviction.

(n) That in each of said counts of said indictment more than one separate and distinct offense is charged in that in each of said counts separate and distinct schemes or artifices are attempted to be alleged.

(o) That each of said counts is duplicitous in that separate and distinct offenses are attempted to be charged by the attempted allegation of separate and distinct schemes and artifices.

(p) That each and every count of said indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

(q) That there is no allegation in said indictment showing that this defendant had anything to do with the scheme or artifice of the defendant H. D. Sanders in organizing and incorporating under the laws of the State of Arizona the Piggly-Wiggly Holding Corporation, or the changing of

the name of said corporation to the U-Save Holding Corporation, which was thereafter engaged in business in the City of Los Angeles, State of California.

(r) That there is no allegation in said indictment that [76] this defendant had anything to do with the scheme or artifice relating to the U-Save Holding Corporation in acquiring a majority of the capital stock of United Sanders Stores, Inc., nor with the schemes and artifice relating to the moving of certain merchandise of the value of more than $1000,000.00 from the warehouse of United Sanders Stores, Inc., of Phoenix, Tucson and Nogales, Arizona, to Los Angeles, California.

(s) That it cannot be ascertained from said indictment, or any count thereof, whether or not this defendant ever at any time mailed, or caused to be mailed, any letters, circulars, or advertisements pertaining to the alleged fraudulent schemes set forth in each count of the indictment.

(t) That it cannot be ascertained from said indictment, or any count thereof, whether this defendant was at any time a stockholder or director, or officer, of the corporation mentioned in said indictment, or either thereof.

(u) That in and by said counts of said indictment it appears that all of the defendants named therein could not be guilty of the offenses charged.

(v) That said counts are defective in that they plead conclusions of fact and of law.

(w) That the alleged scheme or artifice set forth in said counts and each of them wholly fails to disclose such a scheme or artifice as is reasonably calculated to defraud.

(x) That the alleged use of the postoffice establishment of the United States of America by said defendant, in the manner and form as alleged in each and all of the said counts, affirmatively establishes by the allegations of the indictment and the several counts thereof in respect thereto that the same was not and could not have been used for the purpose of executing [77] any such schemes or artifices as is attempted to be alleged in said several counts.

(y) That separate and distinct offenses not capable of being united in the same indictment are improperly joined in said indictment.

(z) That separate and distinct offenses not capable of being united in the same count are improperly joined in each and every count of said indictment.

(aa) That there is a misjoinder of offenses in said indictment and in each and every count thereof.

(bb) That there is a misjoinder of parties defendant in said indictment and in each and every count thereof.

WHEREFORE, this defendant prays that said indictment and each and every count thereof, be

adjudged insufficient; that this demurrer be sustained; and that this defendant be dismissed and discharged.

BAKER & WHITNEY
LAWRENCE L. HOWE

Attorneys for Defendant William Greenbaum 703 Luhrs Tower, Phoenix, Arizona.

Received copy this 4th day of October, 1933.
CLIFTON MATHEWS
United States District Attorney

[Endorsed]: FILED OCT 4 1933 [78]

Minute Entry of
MONDAY, OCTOBER 16, 1933

October 1933 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding

[Title of Cause.]

Separate Demurrers of Defendants to Indictment, and Motions of Defendants to Quash Indictments, come on regularly for hearing this day.

Clifton Mathews, Esquire, United States Attorney, and F. E. Flynn, Esquire, Assistant United States Attorney, appear for the Government. Duane Bird, Esquire, appears as counsel for defendant, A. E. Sanders. Messrs. Baker & Whitney, by L. B. Whitney, Esquire, appear as counsel for Defendants, Gus

B. Greenbaum, Charles Greenbaum, and William Greenbaum.

Upon the consent of respective counsel,

IT IS ORDERED that said Demurrers and Motions be, and the same are hereby continued and reset for hearing Monday, October 23, 1933, at the hour of ten o'clock, A. M. [79]

Minute Entry of

October 1933 Term At Phoenix

MONDAY, OCTOBER 23, 1933

HONORABLE F. C. JACOBS, United States District Judge, Presiding

[Title of Cause.]

Separate Demurrers of Defendants to Indictment, and Motions of Defendants to Quash Indictment, come on regularly for hearing this day.

Clifton Mathews, Esquire, United States Attorney, G. E. Wood, Esquire, and F. E. Flynn, Esquire, Assistant United States Attorneys, appear for the Government.

Duane Bird, Esquire, appears as counsel for Defendant, A. E. Sanders. Messrs. Baker and Whitney, by L. B. Whitney, Esquire, appear as counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum.

Upon stipulation of Duane Bird, Esquire, Messrs. Baker and Whitney, by Louis B. Whitney, Esquire,

and Clifton Mathews, Esquire, United States Attorney,

IT IS ORDERED that Memorandum of Points and Authorities supporting the Demurrers and Motions to Quash of the Defendants, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, stand and apply as a memorandum of Points and Authorities to the Demurrer and Motion to Quash of the Defendant, A. E. Sanders, and

IT IS FURTHER ORDERED that said Defendants be allowed to withdraw their pleas of Not Guilty heretofore entered herein, for the purpose of filing and presenting Demurrers and Motions to Quash, in accordance with the privilege granted heretofore on March 6, 1933. [80]

Argument is now had by respective counsel upon said Demurrers and Motions to Quash, and

IT IS ORDERED that said Demurrers and Motions to Quash Indictment be submitted and by the Court taken under advisement. [81]

Minute Entry of
WEDNESDAY, NOVEMBER 22, 1933

October 1933 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

Separate Demurrer to Indictment, and Motion to Quash Indictment of each of Defendants, A. E. Sanders, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that said Demurrer of each of said Defendants be overruled, and that an exception be entered on behalf of each defendant, and

IT IS FURTHER ORDERED that said Motion to Quash of each of said Defendants be denied, and that an exception be entered on behalf of each defendant. [82]

Minute Entry of
SATURDAY, NOVEMBER 25, 1933

October 1933 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

IT IS ORDERED that the Order hertofore entered herein on November 22, 1933, overruling Defendants' Demurrers to Indictment, be vacated, and

IT IS FURTHER ORDERED that Defendants' Demurrers to Counts 2 to 17 inclusive of the Indict-

ment be sustained; that an exception be entered on behalf of the Government, and that Defendants' Demurrers to Count one of the Indictment be overruled, and that an exception be entered on behalf of the Defendants. [83]

Minute Entry of
FRIDAY, NOVEMBER 24, 1933

October 1933 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

Upon motion of F. E. Flynn, Esquire, Assistant United States Attorney,

IT IS ORDERED that the time for trial setting herein be continued. [84]

Minute Entry of
SATURDAY, APRIL 14, 1934

April 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

This being the time heretofore fixed for plea and trial setting, this case is now regularly called pursuant to notice to counsel. Clifton Mathews, Es-

quire, United States Attorney, and F. E. Flynn, Esquire, Assistant United States Attorney, appear for the Government. Duane Bird, Esquire, appears as counsel for Defendant, A. E. Sanders. Messrs. Baker and Whitney, by L. B. Whitney, Esquire, appear as counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, and

IT IS ORDERED that this case be continued and reset for plea, Saturday, April 21, 1934, at the hour of ten o'clock, A. M. [85]

Minute Entry of
SATURDAY, APRIL 21, 1934

April 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The defendant, A. E. Sanders, is present in person with his counsel Duane Bird, Esquire, and the defendants, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, are present in person, with their counsel, Messrs. Baker and Whitney, by Louis B. Whitney, Esquire, this being the time heretofore fixed for plea herein.

Each of said defendants pleads Not Guilty, which pleas are now duly entered, and

IT IS ORDERED that this case be continued to be set for trial. [86]

Minute Entry of
MONDAY, OCTOBER 22, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

This being the time heretofore fixed for trial setting, this case is now regularly called pursuant to notice to counsel. F. E. Flynn Esquire, Assistant United States Attorney, appears for the Government. Duane Bird, Esquire, appear as counsel for Defendant, A. E. Sanders. Messrs. Baker and Whitney, by L. B. Whitney, Esquire, appear as counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, and

IT IS ORDERED that this case be set for trial Wednesday, November 7, 1934, at the hour of ten o'clock, A. M. [87]

Minute Entry of
WEDNESDAY, NOVEMBER 7, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

This case comes on regularly for trial this day. Clifton Mathews, Esquire, United States Attorney,

F. E. Flynn, Esquire, and John P. Dougherty, Esquire, Assistant United States Attorneys, appear for the Government. The Defendant, A. E. Sanders, is present in person, with his counsel, Duane Bird, Esquire. The Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, are present in person with their counsel, Messrs. Baker and Whitney, by L. B. Whitney, Esquire.

Both sides announce ready for trial.

John B. Ryan is now duly sworn to report the evidence in this case.

A lawful Jury of twelve men is now duly empaneled and sworn to try this case.

In the opinion of the Judge of this Court, the trial of this action is likely to be a protracted one, and the Court finds it necessary to empanel one (1) alternate Juror, pursuant to Section 417A, Title 28, United States Code.

It is therefore ORDERED that an alternate Juror be drawn.

Whereupon, such alternate Juror is drawn and duly sworn to try this case. [88]

Thereupon, IT IS ORDERED that all Jurors not empaneled in the trial of this case be excused to Tuesday, November 20, 1934, at the hour of ten o'clock, A. M.

Subsequently, at the hour of 12:23 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of 9:30 o'clock, A. M., Thursday, November 8, 1934, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused. [89]

Minute Entry of
THURSDAY, NOVEMBER 8, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

John P. Dougherty, Esquire, Assistant United States Attorney, now reads aloud Count One of the Indictment to the Jury, and thereafter said counsel for the Government states to the Jury, the plea of Not Guilty of each defendant to said Count of the Indictment.

Whereupon, counsel for the Defendants moves to invoke the Rule.

F. E. Flynn, Esquire, Assistant United States Attorney now moves to exclude L. D. Null from the operation of the Rule.

Duane Bird, Esquire, now moves to exclude John W. Wagner from the operation of the Rule, and

IT IS ORDERED that said Motions be granted.

Whereupon, the following witnesses are duly sworn, admonished and instructed by the Court, placed under Rule and excluded from the Court Room, except John W. Wagner and L. D. Null:

Margaret Romley	Oscar Schmidt
Anita Bellas	J. M. Nixon
Margery Day	Minor Bishop
J. L. Johnson	John Muldoon
K. C. Van Atta	John Charon [90]
Addie Driscoll	L. R. Reid
Mrs. J. O. Parsons	L. D. Null
Catherine Ryan	John W. Wagner
Tom H. Brandt	

GOVERNMENT'S CASE:

J. L. Johnson, heretofore sworn, is now called and examined on behalf of the Government.

Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, object to the introduction of any evidence, on the ground that the Indictment does not charge any offense.

Defendant, A. E. Sanders, concurs in said objection, and

IT IS ORDERED that said objections be overruled, and that an exception be entered on behalf of said Defendants.

The following Government's Exhibits are admitted and portions thereof read in evidence:

1. Articles of Incorporation of Clarence Saunders Stores, Inc., dated October 18, 1928.

2. Certificate of Amendment of Articles of Incorporation of Clarence Saunders Stores, Inc., dated January 2, 1929.

3. Certificate of Amendment of Articles of Incorporation of Arizona Clarence Saunders Stores, Inc., dated January 21, 1930.

4. Certificate of Amendment of Articles of Incorporation of United Clarence Saunders Stores, Inc., dated November 1, 1930.

5. Articles of Incorporation, Piggly Wiggly Holding Corporation of Yuma, dated April 27, 1929.

6. Certificate of Amendment of the Articles of Incorporation of the Piggly Wiggly Holding Corporation, of Yuma, dated February 19, 1930. [91]

7. Articles of Incorporation of Bond and Mortgage Corporation dated May 1, 1929.

8. Articles of Incorporation of Piggly Wiggly Southwestern Corporation, dated July 9, 1927.

9. Annual Report of Arizona Clarence Saunders Stores, Inc., as of close of Business May 31, 1929.

10. Annual Report of United Clarence Saunders Stores, Inc., as of close of Business May 31, 1930.

11. Annual Report of Bond and Mortgage Corporation, filed with Arizona Corporation Commission June 28, 1929.

12. Annual Report of Bond and Mortgage Corporation, as of close of Business May 27, 1930.

13. Annual Report of U Save Holding Corporation as of close of Business June 30, 1930.

14. Application to Arizona Corporation Commission for permit to sell stock and Permit No. 6225, Investment Company No. 2383, issued by Arizona Corporation Commission to Clarence Saunders Stores, Inc.

15. Application to Arizona Corporation Commission for permit to sell Stock and Permit No. 6310, Investment Company No. 2383, issued by Arizona Corporation Commission to Arizona Clarence Saunders Stores, Inc.

16. Application to Arizona Corporation Commission for permit to sell stock and Permit No.

4854, Investment Company No. 3970-B-2383 issued by Arizona Corporation Commission, Arizona Clarence Saunders Stores, Inc.

17. Application to Arizona Corporation Commission for permit to sell securities and Permit No. 5246, Investment Company No. 3970-B-2383 issued by Arizona Corporation Commission to United Clarence Saunders Stores, Inc.

18. Application to Arizona Corporation Commission for renewal of permit to sell securities and Permit No. 5553, Investment Company No. 3970-B-2383, issued by Arizona Corporation Commission to United Clarence Saunders Stores, Inc. [92]

19. Annual Report of United Clarence Saunders Stores, Inc., for the fiscal year ending June 30, 1930.

F. E. Flynn, Esquire, Assistant United States Attorney, now moves that witnesses heretofore sworn and excluded under the Rule, be now instructed that they may converse with W. G. Means, regarding this case, and that said W. G. Means be granted leave to interview said witnesses, to which Motion counsel for the defendants object, and

IT IS ORDERED that said objection be overruled, to which ruling and Order of the Court, the Defendants except.

Thereupon, the witnesses heretofore excluded under the Rule are now called and instructed that

they may converse with W. G. Means with reference to this case.

And thereupon, at the hour of 11:55 o'clock, A. M., IT IS ORDERED that the further trial of this case be continued to the hour of 2:02 o'clock, P. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 2:02 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

J. L. Johnson, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's Exhibit No. 20, Application to Arizona Corporation Commission for Permit to Deal in Securities and Permit No. 13, issued to Bond and Mortgage Corporation, by Order of The Arizona Corporation Commission, dated December 3, 1929, and Application of each of the following for License as an Agent of a Dealer in Securities:

Charles Greenbaum
William Greenbaum
G. B. Greenbaum [93]
Joseph Rose
S. M. Greenbaum
Marco Messina

is now admitted and portions thereof read in evidence.

J. M. Nixon, heretofore sworn, is now called and examined on behalf of the Government.

The following Government's Exhibits are admitted and portions thereof read in evidence:

23. Certified copy, Articles of Incorporation of Clarence Saunders Stores, Inc., dated October 18, 1928, and Certificate of Incorporation.

24. Minutes of first Meeting of Incorporators of Clarence Saunders Stores, Inc., dated November 28, 1928, Subscription List and Waiver of Notice of Meeting.

25. Minutes of first Meeting of the Directors of Clarence Saunders Stores, Inc., dated November 28, 1928.

26. Letter dated November 28, 1928 to Clarence Saunders Stores, Inc., Nogales, Arizona, signed, A. E. Sanders.

27. Minutes of Special Meeting of the Stockholders of the Clarence Saunders Stores, Inc., dated January 2, 1929.

28. Minutes of Special Meeting of Board of Directors of the Arizona Clarence Saunders Stores, Inc., dated January 22, 1929.

29. Minutes of Special Meeting of Board of

Directors of the Arizona Clarence Saunders Stores, Inc., dated March 16, 1929.

Counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, now moves to Strike Government's Exhibit Number 29, and

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, counsel for Defendants except.

And thereupon, at the hour of 3:17 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of 3:40 o'clock, P. M., this date, to which time the [94] Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 3:40 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

J. M. Nixon, heretofore sworn, is now recalled and further examined on behalf of the Government.

The following Government's Exhibits are admitted and portions thereof read in evidence:

30. Minutes of Special Meeting of Board of Directors of the Arizona Clarence Saunders Stores, Inc., dated June 29, 1929.

31. Minutes of Special Meeting of Board of Directors of the Arizona Clarence Saunders Stores, Inc., dated June 29, 1929.

32. Minutes of Special Meeting of Board of Directors of Arizona Clarence Saunders Stores, Inc., dated October 21, 1929.

33. Minutes of Special Meeting of Board of Directors of Arizona Clarence Saunders Stores, Inc., dated December 10, 1929.

22. Minute Book (Pages 1 to 51, inclusive) Arizona Clarence Saunders Stores, Inc.

Counsel for Defendant, A. E. Sanders, now moves to strike portions of Government's Exhibit No. 22, referring to Kansas Corporation.

Counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, concurs in said Motion, and further moves to strike all of Government's Exhibit No. 22, and

IT IS ORDERED that said Motions be denied, to which ruling and Order of the Court, counsel for said Defendants except.

And thereupon, at the hour of 4:32 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued [95] to the hour of ten o'clock, A. M., Friday, November 9, 1934, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused. [96]

Minute Entry of
FRIDAY, NOVEMBER 9, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

Whereupon, F. E. Flynn, Esquire, Assistant United States Attorney moves to invoke the Rule as to witnesses George Erhardt and G. C. Partee. Said motion is granted and said witnesses are now duly sworn, admonished and instructed by the Court, and excluded from the Court Room.

The following Government's witnesses, heretofore sworn, are called and examined:

Tom H. Brandt

G. C. Partee

Tom H. Brandt, heretofore sworn, is now recalled and further examined on behalf of the Government.

And thereupon, at the hour of 11:57 o'clock, A. M., IT IS ORDERED that the further trial of this case be continued to the hour of 2:03 o'clock, P. M., this date, to which time the Jury, and alternate

Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 2:03 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows: [97]

GOVERNMENT'S CASE CONTINUED:

Tom H. Brandt, heretofore sworn, is now recalled and further examined on behalf of the Government.

George J. Erhardt, heretofore sworn, is now called and examined on behalf of the Government.

Tom H. Brandt, heretofore sworn, is now recalled and further examined on behalf of the Government.

And thereupon, at the hour of 3:01 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of 3:17 o'clock, P. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 3:17 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

Tom H. Brandt, heretofore sworn, is now recalled and further examined on behalf of the Government.

The following Government's witnesses, heretofore sworn, are called and examined:

Margaret Romley

Addie Driscoll.

The following Government's Exhibits are admitted in evidence:

43. Letter dated April 9, 1930, to Addie Driscoll, signed Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary; and envelope attached.

44. Letter dated June 18, 1929, to Addie Driscoll, signed, Arizona Clarence Saunders Stores, Inc., by M. Loveland, Secretary to Manager.

45. Letter dated July 16, 1929, to Addie Driscoll, signed, Arizona Clarence Saunders Stores, Inc., A. E. Saunders, President. [98]

46. Letter dated October 2, 1929, to Addie Driscoll, signed, Arizona Clarence Saunders Stores, Inc., by E. B. Horne, Secretary.

47. Letter dated October 11, 1929, to Addie Driscoll, signed, Arizona Clarence Saunders Stores, Inc., by M. Loveland, Secretary to Manager; and envelope attached.

48. Letter dated November 26, 1929, to Dear Stockholder, signed, A. E. Sanders, President Arizona Clarence Saunders Stores, Inc., and envelope attached.

49. Letter dated December 9, 1929, to Dear Stockholder, signed, A. E. Sanders, President, Arizona Clarence Saunders Stores, Inc., notice and envelope attached.

50. Letter dated April 3, 1930, to Dear Stockholder, signed, United Clarence Saunders Stores, Inc., by A. E. Sanders, President.

51. Letter dated July 1, 1930, to Dear Stockholder, signed, United Clarence Saunders Stores, Inc., by A. E. Sanders, President, and envelope attached.

52. Letter dated July 21, 1930, to Dear Stockholder, signed, United Clarence Saunders Stores, Inc., H. C. Van Atta, Vice-President, and envelope attached.

53. Letter dated September 29, 1930, to Dear Stockholders, notice and envelope attached.

And thereupon, at the hour of 4:35 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of ten o'clock, A. M., Tuesday, November 13, 1934, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

[99]

Minute Entry of
TUESDAY, NOVEMBER 13, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

Addie Driscoll, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's Exhibit No. 54, Notice to Stockholders United Clarence Saunders Stores, Inc., dated October 6, 1930, and envelope attached, is now admitted in evidence.

Upon motion of F. E. Flynn, Esquire, Assistant United States Attorney,

IT IS ORDERED that J. M. Nixon, heretofore sworn, admonished, instructed and placed under the Rule by the Court, be excused subject to call.

It being represented to the Court by F. E. Flynn, Esquire, Assistant United States Attorney, that witness Oliver Fry has failed to attend pursuant to Subpoena heretofore issued October 26, 1934,

IT IS ORDERED that a Bench Warrant be issued forthwith citing said witness to show cause why he should not be punished for contempt of Court.

The following Government's Exhibits are admitted in evidence: [100]

56. Letter to Stockholders of United Sanders Stores, Inc., signed United Sanders Stores, Inc., H. D. Sanders, President, by G. C. Partee, Secretary-Treasurer, Notice, Form of Proxy and envelope attached.

59. Letter dated December 21, 1929 to Addie Driscoll, signed, Arizona Clarence Saunders Stores, Inc., Tom H. Brandt, Controller.

F. E. Flynn, Esquire, Assistant United States Attorney, now reads portions of Government's Exhibits 44, 45, 46, 47, 48, 49, 50, 51, 52, and 53, to the Jury.

Counsel for said Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, now moves to strike Government's Exhibit No. 53, and

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, counsel for said Defendants except.

F. E. Flynn, Esquire, Assistant United States Attorney, now reads portions of Government's Exhibit No. 54, to the Jury.

Counsel for said Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, now moves to strike said Government's Exhibit No. 54, and

IT IS ORDEEED that said Motion be denied, to which ruling and Order of the Court, counsel for said Defendants except.

F. E. Flynn, Esquire, Assistant United States Attorney, now reads portions of Government's Exhibits 56, 59 and 43, to the Jury.

Addie Driscoll, heretofore sworn, is now recalled and further examined on behalf of the Government.

And thereupon, at the hour of 11:36 o'clock, A. M., IT IS ORDERED that the further trial of this case be continued to the hour of 11:45 o'clock, A. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 11:45 o'clock, A. M., the Jury and all members thereof, the alternate Juror, the defendants [101] and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

Government's Exhibit No. 60, Applications for registration of Agent to sell Securities, is now admitted and portions thereof read in evidence by

F. E. Flynn, Esquire, Assistant United States Attorney.

Whereupon, respective counsel stipulate that Government's Exhibit No. 60 is part of the records of the Corporation Commission of the State of Arizona.

And thereupon, at the hour of 11:58 o'clock, A. M., IT IS ORDERED that the further trial of this case be continued to the hour of 2:08 o'clock, P. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 2:08 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

Minor Bishop, heretofore sworn, is now called and examined on behalf of the Government.

The following Government's Exhibits are admitted and portions thereof read in evidence:

61. Copy of Subscription Agreement No. 5583, $15.00, dated August 7, 1930, signed Agnes M. Bishop, copy of subscription agreement No. 5584, $1500.00, dated August 7, 1930, signed, Minor A. Bishop, excepting signatures in lower left hand corner thereof, and notation on back.

62. Letter to Minor A. Bishop, dated August 11, 1930, signed Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary, excepting notation in ink on upper right side of said Letter. [102]

63. Letter to Minor A. Bishop, dated August 12, 1930, signed, Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary.

64. Letter to Stockholders of United Sanders Stores, Inc., dated January 10, 1931, with Statement of Assets and Liabilities, dated December 31, 1930, attached.

John Muldoon, heretofore sworn, is now called and examined on behalf of the Government.

Government's Exhibit No. 65, Copy of Subscription Agreement No. 5727, in the sum of $4200.00, dated May 22, 1930, signed, John Muldoon; copy of Subscription Agreement No. 5985, dated July 29, 1930, in the sum of $3,000.00, signed, John Muldoon, and Copy of Subscription Agreement No. 5989, dated August 6, 1930, in the sum of $3,000.00, signed John Muldoon, is now admitted and portions thereof read in evidence.

And thereupon, at the hour of 3:21 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of 3:40 o'clock, P. M., this date, to which time the Jury, and alternate

Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 3:40 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

John Muldoon, heretofore sworn, is now recalled and further examined on behalf of the Government.

The following Government's Exhibits are admitted and portions thereof are read in evidence:

66. Letter to John Muldoon, dated July 31, 1930, signed, Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary.

67. Certificate of Stock, No. 1914, to John Muldoon, [103] for 400 shares Common Stock United Clarence Saunders Stores, Inc., and Certificate of Stock, No. 1978, to John Muldoon, for 400 shares Common Stock United Clarence Saunders Stores, Inc., and Certificate of Stock, No. 2007, to John Muldoon, for 267 shares Common Stock United Clarence Saunders Stores, Inc.

W. R. Montgomery is now duly sworn and examined on behalf of the Government.

Oscar Schmidt, heretofore sworn, is now called and examined on behalf of the Government.

The following Government's Exhibits are admitted and portions thereof read in evidence:

70. Letter dated March 14, 1929, to Oscar or Hattie Schmidt, signed, Arizona Clarence Saunders Stores, Inc., by M. Loveland, Secretary to Manager.

71. Letter dated July 13, 1929 to Oscar Schmidt, signed, Arizona Clarence Saunders Stores, Inc., by M. Loveland, Secretary to Manager.

72. Letter dated January 31, 1931, to Oscar Schmidt, signed, United Sanders Stores, Inc., G. C. Partee, Sec. and Treas.

Counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, now moves to strike Government's Exhibit No. 72, and

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, counsel for said Defendants except.

Katherine Ryan, heretofore sworn, is now called and examined on behalf of the Government.

The following Government's Exhibits are admitted and read in evidence:

73. Receipt to Catherine Ryan, dated July 21, 1930, for $300.00, signed, Bond and Mortgage Corporation, Chas. Greenbaum.

74. Letter dated July 22, 1930 to Catherine Ryan, signed Bond & Mortgage Corporation, by M. Loveland E. F. Assistant Secretary.

Government's Exhibit No. 75, letter dated July 10, 1929, [104] to Mrs. Catherine Ryan, signed, Arizona Clarence Saunders Stores, Inc., E. B. Horne, Secretary, is now admitted and a portion thereof read in evidence.

Upon motion of Duane Bird, Esquire,

IT IS ORDERED that Defendant, A. E. Sanders, be allowed to withdraw his Plea of Not Guilty heretofore entered herein, and enter plea of nolo cotendere.

And thereupon, at the hour of 4:40 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of ten o'clock, A. M., Wednesday, November 14, 1934, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused. [105]

Minute Entry of
WEDNESDAY, NOVEMBER 14, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants and all counsel are present,

pursuant to recess, and further proceedings of trial are had as follows:

Upon motion of John P. Dougherty, Esquire, Assistant United States Attorney, A. E. Sanders is now duly sworn, admonished, instructed, placed under the Rule, and excluded from the Court Room.

GOVERNMENT'S CASE CONTINUED:

W. R. Montgomery, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's Exhibit No. 76, Letter dated July 2, 1929 to Valley Bank, signed, A. E. Sanders, President; E. B. Horne, Secretary; Warfield Ryly, Gen'l Manager; Willis M. Dent, Cashier; M. V. Lee, Cashier; E. A. Lassale, Assistant Manager, is now admitted and read in evidence.

The following Government's Exhibits are admitted in evidence:

68. Ledger Sheet, Arizona Clarence Saunders Stores, Dividend Account.

69. 2 Ledger Sheets, Arizona Clarence Saunders, Inc., Dividend Acct. 305 S. 2 Ave., City, in account with The Valley Bank, Phoenix, Arizona.

Counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, now moves to Strike Government's [106] Exhibits Numbers 68, 69 and 76, and

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, the said Defendants except.

J. M. Nixon, heretofore sworn, is now recalled and further examined on behalf of the Government.

Oliver Fry is now duly sworn and examined on behalf of the Government.

Government's Exhibit No. 77, Letter dated January 12, 1929, to Oliver Frye, signed Arizona Clarence Saunders Stores, Inc., G. B. Greenbaum, Financial Manager, and envelope attached excluding notations on back of Letter, is now admitted and a portion thereof read in evidence.

Mrs. J. O. Parsons, heretofore sworn, is now called and examined on behalf of the Government.

The following Government's Exhibits are admitted in evidence:

78. Check dated May 27, 1930, to the Order of Bond and Mortgage Corporation for $223.63, signed, Mrs. J. O. Parsons.

79. Letter dated November 26, 1929, to Dear Stockholder, signed, A. E. Sanders, President, Arizona Clarence Saunders Stores, Inc., and envelope attached.

Government's Exhibit No. 80, Letter dated May 29, 1930, to Mrs. John O. Parsons, signed, Bond and Mortgage Corporation, by M. Loveland, is now admitted and read in evidence.

John Charon, heretofore sworn, is now called and examined on behalf of the Government.

Government's Exhibit No. 81, Letter dated July 13, 1929, Mr. and/or Mrs. John Charon, signed, Arizona Clarence Saunders Stores, Inc., E. B. Horne, Secretary, is now admitted and read in evidence.

Tom H. Brandt, heretofore sworn, is now recalled and further examined on behalf of the Government. [107]

Government's Exhibit No. 82, Check No. 4517, dated November 19, 1929, to the Order of Greenbaum Brothers, for $1025.00, signed, Tom H. Brandt, A. E. Sanders, office copy of said check and Statement, is now admitted in evidence.

Counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, now moves to strike Government's Exhibit No. 82, and

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, said Defendants except.

Government's Exhibit No. 40, Financial Statement, United Clarence Saunders Stores, Inc., dated December 31, 1929, is now admitted in evidence.

And thereupon, at the hour of 12:02 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of 2:06 o'clock, P. M., this date, to which time the Jury, and alternate

Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 2:06 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

Margaret Romley, heretofore sworn, is now recalled and further examined on behalf of the Government.

The following Government's Exhibits are admitted and portions thereof read in evidence.

83. Letters dated August 29, 1929, to Dear Stockholder, signed, Arizona Clarence Saunders Stores, Inc., by A. E. Sanders, President.

84. Letter dated September 16, 1929, to Dear Stockholder, signed, Arizona Clarence Saunders Stores, Inc., by A. E. Sanders, President.

Samuel W. Hamilton is now duly sworn and examined on behalf of the Government. [108]

The following Government's Exhibits are admitted in evidence:

85. Letterhead, Financial Department, Arizona Clarence Saunders Stores, Inc.

86. Letterhead, Bond and Mortgage Corporation.

87. Form of 8% Gold Debentures, United Clarence Saunders Stores, Inc.

Counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, now moves to strike Government's Exhibit No. 87, and

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, said Defendants except.

A. E. Sanders, heretofore sworn, is now called and examined on behalf of the Government.

And thereupon, at the hour of 3:11 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of 3:22 o'clock, P. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 3:22 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

A. E. Sanders, heretofore sworn, is now recalled and further examined on behalf of the Government.

L. D. Null is now duly sworn and examined on behalf of the Government.

And thereupon, at the hour of 4:30 o'clock, P. M., IT IS ORDERED that the further trial of this

case be continued to the hour of 9:30 o'clock, A. M., Thursday, November 15, 1934, to which time the defendants and counsel are excused.

Whereupon, the Jury, and alternate Juror, being first duly admonished by the Court, are excused until the hour of ten o'clock, A. M., Thursday, November 15, 1934. [109]

Minute Entry of
THURSDAY, NOVEMBER 15, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants and all counsel are present pursuant to recess and further proceedings of trial are had as follows:

It being represented to the Court by F. E. Flynn, Esquire, Assistant United States Attorney, that it was necessary for the witness, John Muldoon, to travel from Seligman, Arizona, to Phoenix, Arizona, in advance of date fixed for the trial of this case, to consult with counsel for the Government,

IT IS ORDERED that the Clerk pay to said witness, fees for mileage from Seligman, Arizona, to Phoenix, Arizona, and return.

Upon motion of Theodore Rein, Esquire,

IT IS ORDERED that counsel for Defendants be allowed to withdraw Government's Exhibit No. 88 for identification, for the purpose of making examination of said exhibit.

And thereupon, at the hour of 11:04 o'clock, A. M., IT IS ORDERED that the further trial of this case be continued to the hour of 2:01 o'clock, P. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 2:01 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants [110] and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Theodore Rein, Esquire, now moves for additional time within which to examine Government's Exhibit No. 88 for identification, and

IT IS ORDERED that said Motion be granted, and that counsel for defendants be allowed until ten o'clock, A. M., Friday, November 16, 1934, within which to examine said exhibit.

And thereupon, at the hour of 2:05 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of ten o'clock, A. M., Friday, November 16, 1934, to which time the Jury, and alternate Juror, being first duly admonished

by the Court, the defendants and counsel are excused. [111]

Minute Entry of
FRIDAY, NOVEMBER 16, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

L. D. Null, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's Exhibit No. 89, Profit and Loss Statement, United Sanders Stores, Inc., Year 1929, is now admitted and read in evidence.

Theodore Rein, Esquire, now moves to strike Government's Exhibit No. 89, and

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, counsel for Defendants except.

The following Government's Exhibits are admitted and read in evidence:

90. Profit and Loss Statement, United Sanders Stores, Inc., Nine Months ended September 30, 1930.

91. Balance Sheet, United Sanders Stores, Inc., dated September 30, 1930.

Theodore Rein, Esquire, now moves to Strike Government's Exhibit No. 90, and

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, counsel for Defendants except.

Theodore Rein, Esquire, now moves to Strike Government's Exhibit No. 91, and [112]

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, counsel for Defendants except.

And thereupon, at the hour of 11:59 o'clock, A. M., IT IS ORDERED that the further trial of this case be continued to the hour of 2:02 o'clock, P. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 2:02 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

L. D. Null heretofore sworn, is now recalled and further examined on behalf of the Government.

And thereupon, at the hour of 3:15 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of 3:34 o'clock, P. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 3:34 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

The following Government's witnesses, heretofore sworn, are recalled and further examined:

L. D. Null

Tom H. Brandt.

The following Government's Exhibits are admitted and read in evidence:

94. Letter dated June 18, 1930, to United Clarence Saunders Stores, Inc., signed, Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary. [113]

95. Letter dated June 17, 1930, to United Clarence Saunders Stores, Inc., signed, Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary.

Government's Exhibit No. 96, Ledger Sheet, Capital Stock Ledger, William Bianconi, is now admitted in evidence.

The following Government's Exhibits are admitted and read in evidence:

97. Letter dated July 1, 1930, to United Clarence Saunders Stores, Inc., signed, Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary.

98. Letter dated July 2, 1930, to United Clarence Saunders Stores, Inc., signed, Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary.

Upon motion of Lawrence L. Howe, Esquire,

IT IS ORDERED that said counsel be allowed to withdraw Government's Exhibit No. 88, for identification, and said exhibit to be returned November 20, 1934.

And thereupon, at the hour of 4:45 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of ten o'clock, A. M., Tuesday, November 20, 1934, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused. [114]

Minute Entry of
TUESDAY, NOVEMBER 20, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

Tom H. Brandt, heretofore sworn, is now recalled and further examined on behalf of the Government.

The following Government's Exhibits are admitted and read in evidence:

99. Letter dated July 14, 1930, to United Clarence Saunders Stores, Inc., signed, Bond and Mortgage Corporation, by M. Loveland, Asst. Secretary, excluding Notations in ink.

100. Letter dated July 21, 1930, to United Clarence Saunders Stores, Inc., signed, Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary, excluding notations in ink.

101. Letter dated July 22, 1930, to United Clarence Saunders Stores, Inc., signed, Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary, excluding notation in ink.

The following Government's exhibits are admitted in evidence:

102. Letter dated July 23, 1930, to United Clarence Saunders Stores, Inc., signed, Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary, excluding notations in ink. [115]

103. Letter dated July 26, 1930, to United Clarence Saunders Stores, Inc., signed, Bond and Mortgage Corporation, by M. Loveland, Asst. Secretary, excluding notations in pencil.

G. C. Partee, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's Exhibit No. 105, Letter dated November 4, 1930, to United Clarence Saunders, Stores, Inc., signed Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary, excluding notations in ink, is now admitted in evidence.

Government's Exhibit No. 106, Letter dated November 10, 1930, to United Clarence Saunders Stores, Inc., signed, Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary, excluding notations in ink, is now admitted and read in evidence.

Government's Exhibit No. 104, Nine (9) Ledger Sheets, Capital Stock Ledger, Account Bond & Mortgage Corp., is now admitted in evidence.

Tom H. Brandt, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's Exhibit No. 107, Two (2) Ledger Sheets, Capital Stock Ledger, Account Greenbaum Bros., is now admitted in evidence.

And thereupon, at the hour of 11:50 o'clock, A. M., the Jury, and alternate Juror, being first duly admonished by the Court, are excused to the hour of 2:00 o'clock, P. M., this date.

Whereupon, in the absence of the Jury, argument is now had by respective counsel upon the admissibility of Defendants' Exhibit "E," Statement of Tom H. Brandt, dated August 11, 1930. [116]

And thereupon, at the hour of 11:54 o'clock, A. M., IT IS ORDERED that the further trial of this case be continued to the hour of 2:03 o'clock, P. M., this date, to which time the defendants and counsel are excused.

Subsequently, at the hour of 2:03 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the Defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

Tom H. Brandt, heretofore sworn, is now recalled and further examined on behalf of the Government.

And thereupon, at the hour of 2:10 o'clock, P. M., the Jury, and alternate Juror, being first duly admonished by the Court, are excused subject to call.

Whereupon, in the absence of the Jury, further argument is now had be respective counsel upon the admissibility of Defendants' Exhibit "E", Statement of Tom H. Brandt, dated August 11, 1930.

Subsequently, at the hour of 2:24 o'clock, P. M., the Jury and all members thereof, and alternate Juror, return into open Court.

And thereupon, at the hour of 2:39 o'clock, P. M., the Jury, and alternate Juror, being first duly admonished by the Court, are excused subject to call.

Whereupon, in the absence of the Jury, Lawrence L. Howe, Esquire, makes a statement of matters defendants propose to prove by admission of Defendants' Exhibit "E", Statement of Tom H. Brandt, dated August 11, 1930, and by further examination of witness, Tom H. Brandt.

And thereupon, at the hour of 2:49 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued [117] to the hour of 3:13 o'clock, P. M., this date, to which time the defendants and counsel are excused.

Subsequently, at the hour of 3:13 o'clock, P. M., the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

And thereupon, at the hour of 3:15 o'clock, P. M., the Jury and all members thereof, and alternate Juror, return into open Court.

GOVERNMENT'S CASE CONTINUED:

The following witnesses, heretofore sworn, are now recalled and further cross examined on behalf of the Defendants:

Tom H. Brandt

L. D. Null.

Roy N. Davidson is now duly sworn and examined on behalf of the Government.

A. E. Sanders, heretofore sworn, is now recalled and further examined on behalf of the Government.

Whereupon, counsel for Defendants object to the introduction of Income Tax Returns of Sanders Stores, and the Court directs Mr. Davidson, Internal Revenue Collector for this District, to disclose the record, and that Mr. Davidson's objection to producing and disclosing the record under the regulations of the Department, be overruled.

And thereupon, at the hour of 4:10 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of ten o'clock, A. M., Wednesday, November 21, 1934, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused. [118]

Minute Entry of
WEDNESDAY, NOVEMBER 21, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

GOVERNMENT'S CASE CONTINUED:

Roy N. Davidson, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's Exhibit No. 108, Telegram dated November 21, 1934, to Acting Collector of Internal Revenue, Phoenix, Arizona, signed, Helvering Commr., is now admitted in evidence.

The following Government's Exhibits are admitted and read in evidence.

109. Treasury Department, U. S. Internal Revenue Form 649, Income Tax, Ariz. Clarence Saunders Stores, Tucson, Arizona, 1928 and 1929.

110. Treasury Department, U. S. Internal Revenue, Form 649, Income Tax United Sanders Stores, Inc., Years 1930, 1931 and 1932.

IT IS ORDERED that Government's Exhibits Numbers 109 and 110, be allowed to be withdrawn, and that certified copies be substituted in lieu thereof.

Theodore Rein, Esquire, now moves to strike Govern- [119] ment's Exhibits 109 and 110, and

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, the Defendants except.

Whereupon, the Government rests.

And thereupon, at the hour of 11:27 o'clock, A.M., IT IS ORDERED that the further trial of this

case be continued to the hour of ten o'clock, A. M., Thursday, November 22, 1934, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused. [120]

Minute Entry of
THURSDAY, NOVEMBER 22, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

And thereupon, at the hour of 10:09 o'clock, A. M., the Jury, and alternate Juror, being first duly admonished by the Court, are excused subject to call.

Whereupon, in the absence of the Jury, Theodore Rein, Esquire, moves to Strike Government's Exhibits 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 44, 45, 83, 84, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56, and to strike all testimony regarding Government's Exhibits 4, 5, 6, and 8.

Subsequently, at the hour of 10:43 o'clock, A. M., the Jury and all members thereof, and alternate Juror, return into open Court.

And thereupon, at the hour of 10:45 o'clock, A. M., the Jury, and alternate Juror, being first duly admonished by the Court, are excused to the hour of 2:00 o'clock, P. M., this date.

Whereupon, in the absence of the Jury, Theodore Rein, Esquire, now moves to strike Government's Exhibits Numbers 59, 43, 77, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, [121] 74, 75, 76, 78, 79, 80, 81, 82, 85, 86, 87, 89, 90, 91, 23, 24, 27, 28, 29, 30, 31, 22, 106, 105, 103, 102, 101, 100, 99, 98, 97, 94, 95, 109, 110, and 108.

And thereupon, at the hour of 11:45 o'clock, A. M., IT IS ORDERED that the further trial of this case be continued to the hour of 2:04 o'clock, P. M., this date, to which time the defendants and counsel are excused.

Subsequently, at the hour of 2:04 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the Defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

And thereupon, at the hour of 2:06 o'clock, P. M., the Jury, and alternate Juror, being first duly admonished by the Court, are excused subject to call.

Whereupon, in the absence of the Jury, further argument is had by respective counsel on Defendant's Motion to Strike certain Exhibits.

L. B. Whitney, Esquire, now moves for a Directed Verdict in favor of Defendants Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, and argument thereon is now had by said counsel.

Subsequently, at the hour of 3:08 o'clock, P. M., the Jury and all members thereof, and alternate Juror, return into open Court.

And thereupon, at the hour of 3:09 o'clock, P. M., the Jury, and alternate Juror, being first duly admonished by the Court, are excused to the hour of ten o'clock, A. M., Friday, November 23, 1934.

Whereupon, in the absence of the Jury, further argument is now had by Theodore Rein, Esquire, on said Defendants' Motion for Directed Verdict. [122]

And thereupon, at the hour of 3:36 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of 3:57 o'clock, P. M., this date, to which time the defendants and counsel are excused.

Subsequently, at the hour of 3:57 o'clock, P. M., the Defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Whereupon, in the absence of the Jury, further argument is now had by Theodore Rein, Esquire, and F. E. Flynn, Esquire, Assistant United States Attorney, on Defendants' Motion for Directed Verdict, and

IT IS ORDERED that Defendants' Motions to Strike Certain Exhibits and for Directed Verdict, be submitted and by the Court taken under advisement.

And thereupon, at the hour of 4:38 o'clock, P. M., IT IS ORDERED that the further trial of this case be continued to the hour of ten o'clock, A. M., Friday, November 23, 1934, to which time the defendants and counsel are excused. [123]

Minute Entry of
FRIDAY, NOVEMBER 23, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Defendants' Motion to Strike certain Governments' Exhibits, having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that Defendants' Motion to Strike Government's Exhibits Numbers 1, 2, 3, 4,

5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 44, 45, 83, 84, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 43, 77, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 85, 86, 87, 89, 90, 91, 23, 24, 27, 28, 29, 30, 31, 22, 106, 105, 103, 102, 101, 100, 99, 98, 97, 94, 95, 109, 110, and 108, be denied, and that an exception be entered on behalf of said Defendants.

Motion of Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, for Directed Verdict, having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises, [124]

IT IS ORDERED that said Motion be denied, and that an exception be entered on behalf of said Defendants.

And the Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, rest.

Both sides rest.

Thereupon, Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, through their counsel, Alexander B. Baker, Esquire, renew Motion for Directed Verdict, and

IT IS ORDERED that said Motion be denied, to which ruling and Order of the Court, said Defendants except.

Upon motion of F. E. Flynn, Esquire, Assistant United States Attorney,

IT IS ORDERED that all witnesses heretofore subpoenaed in this case be excused from further attendance.

IT IS ORDERED that this case be continued for Judgment, as to Defendant, A. E. Sanders, to Tuesday, December 4, 1934, at the hour of ten o'clock, A. M.

And thereupon, at the hour of 10:40 o'clock, A. M., IT IS ORDERED that the further trial of this case be continued to the hour of 2:25 o'clock, P. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused.

Subsequently, at the hour of 2:25 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the defendants and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

All the evidence being in, the case is argued by John P. Dougherty, Esquire, Assistant United States Attorney, and Theodore Rein, Esquire, to the Jury. [125]

And thereupon, at the hour of 4:20 o'clock, P. M., IT IS ORDERED that further proceedings in this case be continued to Tuesday, November 27, 1934, at the hour of ten o'clock, A. M., to which time the Jury, and alternate Juror, being first duly admonished by the Court, the defendants and counsel are excused. [126]

Minute Entry of
TUESDAY, NOVEMBER 27, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the alternate Juror, the defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, and their counsel are present pursuant to recess, and further proceedings are had as follows:

Further argument to the Jury is now had by counsel for said Defendants.

And thereupon, at the hour of 11:58 o'clock, A. M., IT IS ORDERED that further proceedings herein be continued to the hour of 2:06 o'clock, P. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the said defendants and counsel are excused.

Subsequently, at the hour of 2:06 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Further argument to the Jury is now had by counsel for said Defendants.

And thereupon, at the hour of 3:10 o'clock, P. M., IT IS ORDERED that further proceedings herein be continued to the hour of 3:30 o'clock, P. M., this date, to which time the Jury, and alternate Juror, being first duly admonished by the Court, the said defendants and counsel are excused.

Subsequently, at the hour of 3:30 o'clock, P. M., the Jury and all members thereof, the alternate Juror, the Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, and counsel for respective parties being present pursuant to recess, [127] further proceedings of trial are had as follows:

Argument is now had by F. E. Flynn, Esquire, Assistant United States Attorney, to the Jury. Whereupon, the Court duly instructs the Jury.

IT IS ORDERED that the Marshal provide meals and lodging for said Jury and their bailiff during the deliberation of this case at the expense of the United States.

Counsel for said Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, except to certain instructions given to the Jury.

Thereupon, IT IS ORDERED that alternate Juror, F. W. Griffen, be excused from further attendance upon this Court until Tuesday, December 4, 1934, at the hour of ten o'clock, A. M.

IT IS ORDERED that the verdict be sealed and delivered to the Clerk; that said Jury be excused

for the night, returning in a body into open Court at the hour of ten o'clock, A. M., Wednesday, November 28, 1934, providing said verdict is agreed upon by the hour of ten o'clock, P. M., this date.

IT IS FURTHER ORDERED that should said Jury fail to agree upon a verdict by the hour of ten o'clock, P. M., this date, that said Jury remain in charge of their bailiff for the night.

Thereupon, said Jury retire at the hour of 5:30 o'clock, P. M., in charge of sworn bailiff to consider of their verdict.

IT IS ORDERED that further proceedings herein be continued to the hour of ten o'clock, A. M., Wednesday, November 28, 1934, to which time the defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, and counsel are excused. [128]

Minute Entry of
WEDNESDAY, NOVEMBER 28, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding.

[Title of Cause.]

The Jury, and all members thereof, the Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, and all counsel are present

pursuant to recess, and further proceedings are had as follows:

The Jury are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents sealed verdicts which are now opened by the Court in the presence of the Jury, and are as follows, to-wit:

C-4879—Phoenix

UNITED STATES OF AMERICA,

Plaintiff

Against

A. E. SANDERS,
H. D. SANDERS,
GUS B. GREENBAUM,
CHARLES GREENBAUM, and
WILLIAM GREENBAUM,

Defendants.

VERDICT

WE, THE JURY, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Gus B. Greenbaum, on the first count Guilty.

JOHN HAUSNER,
Foreman. [129]

C-4879—Phoenix

UNITED STATES OF AMERICA,

Plaintiff

Against

A. E. SANDERS,
H. D. SANDERS,
GUS B. GREENBAUM,
CHARLES GREENBAUM, and
WILLIAM GREENBAUM,

Defendants.

VERDICT

WE, THE JURY, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the Defendant, Charles Greenbaum, on the first count Guilty.

JOHN HAUSNER,
Foreman.

C-4879—Phoenix

UNITED STATES OF AMERICA,

Plaintiff

Against

A. E. SANDERS,
H. D. SANDERS,
GUS B. GREENBAUM,
CHARLES GREENBAUM, and
WILLIAM GREENBAUM,

Defendants.

VERDICT

WE, THE JURY, duly empaneled and sworn in the above entitled action, upon our Oaths, do find

the Defendant, William Greenbaum, on the first county Guilty.

JOHN HAUSNER,
Foreman.

The verdicts are read as recorded and no poll being desired by either side, the Jury is discharged from the further consideration of this case, and until Tuesday, December 4, 1934, at the hour of ten o'clock, A. M.

Upon motion of L. B. Whitney, Esquire,

IT IS ORDERED that said Defendants be released upon their present bonds until Tuesday, December 4, 1934, at the hour of ten o'clock, A. M., and

IT IS FURTHER ORDERED that this case be set for Judgment and Sentence, Tuesday, December 4, 1934, at the hour of ten o'clock, A. M., as to Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum. [130]

[Title of Court and Cause.]

MOTION OF DEFENDANTS GREENBAUM FOR A NEW TRIAL

COME NOW the defendants Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, by their attorneys Messrs. Baker & Whitney and Lawrence L. Howe, Esq., and Theodore E. Rein,

Esq., and jointly and severally move the Court to vacate and set aside the verdict returned and filed herein and to grant them and each of them a new trial in the above entitled cause upon the following grounds and for the following reasons:

(1) The Court erred during the trial of said cause in the decisions of questions of law arising during the course of said trial.

(2) The Court committed material error, calculated and tending to injure the rights of the said defendants and each of them in this case, by admitting incompetent, irrelevant, immaterial and hearsay evidence on the part of the United States of America over the objections of the defendants and each of them.

(3) The Court committed material error, calculated and tending to injure the rights of the said defendants and each of them, in excluding competent, material and relevant evidence offered by the defendants, and each of them, at the trial of said cause. [131]

(4) The Court erred in misdirecting the Jury as to the law of the case.

(5) The Court committed material error in rejecting the said defendants', and each of their motions to instruct the Jury to return a verdict of "Not Guilty" at the close of the United States of America's case.

(6) The Court committed material error in rejecting the said defendants', and each of their, motions to instruct the Jury to return a verdict of "Not Guilty" at the conclusion of the whole case.

(7) The Court erred in improperly refusing, to the prejudice of the rights of the defendants, and each of them, to give correct instructions requested by said defendants.

(8) The Court erred in restricting defendants, and each of them, the right to cross-examine the witness Tom Brandt.

(9) That there is a variance between the charge laid in the indictment and the proof.

(10) That the verdict is contrary to the law.

(11) That the verdict is contrary to the evidence.

(12) That the verdict is contrary to the law and the evidence.

WHEREFORE, these defendants, and each of them, pray that the Court vacate and set aside the verdict returned by the Jury and filed herein and that the Court grant the defendants, and each of them, a new trial of the said cause to the end that justice may be done and the rights of the said defendants, and each of them, be preserved.

Dated: at Phoenix, Arizona, this 1st day of December, 1934.

BAKER & WHITNEY
LAWRENCE L. HOWE
703 Luhrs Tower, Phoenix, Ariz.

THEODORE E. REIN
10 So LaSalle St.,Chicago,Ill
Attorneys for Gus B., Charles and William Greenbaum. [132]

Received copy of the within instrument this 1st day of December 1934.

CLIFTON MATHEWS
United States District Attorney, Attorney for Plaintiff.

[Endorsed]: Filed DEC 1 1934 [133]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT

NOW, after the verdict against the defendants Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, and each of them, and before sentence, comes the defendants Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, and each of them, by Baker & Whitney and Lawrence L. Howe, Esq., and Theodore E. Rein, Esq., their attorneys and move the Court here to arrest judgment herein and hold for naught the verdict of Guilty, rendered against them, the said defendants, and each of them, for the following reasons:

(1) That the said indictment was not presented and returned to the Court as provided by law, in that it was not presented to the Court in the presence of all of the members of the Grand Jury that found the same, one of said grand jurors, namely; H. J. Peterson, having been unlawfully excused by the foreman of said Grand Jury, and being not present in Court when said indictment was presented by the foreman of said grand jury to the Court. This motion is based on said grand jury report and the proceedings of said grand jury, as shown by the records of this Court. (Minute Entry of February 23, 1933.) [134]

(2) That the first count of the indictment herein fails to charge a crime and fails to set forth any facts which constitute an offense against any law or statute of the United States of America.

(3) That the scheme or artifice alleged, or attempted to be alleged in the first count of the indictment herein does not constitute a fraudulent scheme or artifice or indicate an intention or purpose to perpetrate a fraud.

(4) That no where in the first count of the indictment are facts and circumstances well and sufficiently pleaded which constitute a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.

(5) That the indictment is not sufficient in form or substance to enable these defendants to plead

the judgment in bar of another prosecution for the same offense.

(6) That the first count of the indictment is vague, uncertain and indefinite and does not sufficiently state or aver, or set forth the alleged offense charged in said first count against these defendants, or either of them, or, the acts and facts constituting the same, to apprise said defendants, and each of them, of the crime or offense with which they, or either of them, therein stands charged.

(7) That the allegations contained in the positive and negative averments of the first count of the indictment are so contradictory, each of the other, as not to properly allege or describe a scheme or artifice to cheat or defraud.

(8) That the first count of the indictment is bad and duplicitous, in that it charges in a single count the commission of more than one offense, contrary to the provisions of Section 1024, Revised Statutes of the United States. [135]

(9) That in the first count of the indictment more than one separate and distinct offense is charged, in that separate and distinct scheme or artifices are attempted to be alleged.

(10) That there is no allegation in the first count of said indictment showing that these defendants, or either of them, had anything to do with the scheme or artifice of the defendant H. D. Sanders in organizing and incorporating under the

laws of the State of Arizona, the Piggly-Wiggy Holding Corporation, or the changing of the name of said corporation to the U-Save Holding Corporation, which was thereafter engaged in business in the City of Los Angeles, State of California.

(11) That there is no allegation in the first count of said indictment that these defendants, or either of them, had anything to do with the scheme or artifice relating to the U-Save Holding Corporation in acquiring a majority of the capital stock of theUnited Sanders Stores, Inc., nor with the scheme and artifice relating to the moving of certain merchandise of the value of more than $100,000.00 from the warehouse of United Sanders Stores, Inc., of Phoenix, Tucson and Nogales, Arizona, to Los Angeles, California.

(12) That it cannot be ascertained from the first count of said indictment whether these defendants, or either of them, were at any time stockholders or directors, or officers of the corporations mentioned in said indictment, or either thereof.

(13) That in and by said first count of said indictment it appears that all of the defendants named therein could not be guilty of the offenses charged.

(14) That separate and distinct schemes, not capable of being united in the first count of the indictment, are improperly joined in said first count of the indictment. [136]

(15) That there is a misjoinder of offenses in the first count of said indictment.

(16) That there is a misjoinder of parties defendant in the first count of said indictment.

WHEREFORE, these defendants, and each of them, pray that said judgment be arrested and that no sentence or judgment be pronounced or rendered on the verdict.

Dated: At Phoenix, Arizona, this 1st day of December, 1934

BAKER & WHITNEY
LAWRENCE L. HOWE
703 Luhrs Tower, Phoenix, Ariz.

THEODORE E. REIN
10 So LaSalle St.,Chicago,Ill
Attorneys for defendants Gus B. Greenbaum, Charles Greenbaum and William Greenbaum.

Received copy of the within instrument this 1st day of December 1934

CLIFTON MATHEWS
United States District Attorney, Attorney for Plaintiff.

[Endorsed]: Filed DEC 1 1934 [137]

Minute Entry of
TUESDAY, DECEMBER 4, 1934.

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding

[Title of Cause.]

F. E. Flynn, Esquire, Assistant United States Attorney, appears for the Government. The defendant, A. E. Sanders, is present in person, with his counsel, Duane Bird, Esquire, and the Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, are present in person, with their counsel, Messrs. Baker and Whitney, by L. B. Whitney, Esquire, this being the time heretofore fixed for judgment herein.

Motions of Defendants, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, for New Trial and in Arrest of Judgment, are now presented to the Court.

Said motion for New Trial is now argued by said counsel for said Defendants, and

IT IS ORDERED that said Motions for New Trial and in Arrest of Judgment be denied, and that an exception be entered on behalf of said Defendants, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum.

IT IS FURTHER ORDERED that this case be continued and reset for Judgment and Sentence Wednesday, December 5, 1934, at the hour of ten

o'clock, A. M., and that Bond on Appeal be fixed in the penal sum of Five Thousand Dollars ($5,000.00) as to each defendant, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum. [138]

Minute Entry of
WEDNESDAY, DECEMBER 5, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, Presiding

C-4879

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. E. SANDERS,
GUS B. GREENBAUM,
CHARLES GREENBAUM, and
WILLIAM GREENBAUM,

Defendants.

Clifton Mathews, Esquire, United States Attorney, and F. E. Flynn, Esquire, Assistant United States Attorney, appear as counsel for the Government. The Defendant, A. E. Sanders, is present in person with his counsel, Duane Bird, Esquire, and the Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, are present in person with their counsel, Messrs. Baker and

Whitney, by L. B. Whitney, Esquire, this being the time heretofore fixed for judgment herein.

Said defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, are now duly informed by the Court of the nature of the crime charged in Count one of the Indictment herein, to-wit: unlawfully and feloniously using the mails to defraud by having devised a scheme and artifice for obtaining money by means of false and fraudulent representations to procure said money unlawfully through correspondence by placing said correspondence in an envelope and depositing the same in a United States Post Office at Phoenix in the District of Arizona, for delivery as directed; committed on or about April 9, 1930, in violation of Section 338, Title 18, United States Code Annotated; of their arraignment on said charge, and of their pleas of Not Guilty thereto, and of their trial and [139] conviction thereof by jury, and no legal cause appearing why judgment should not now be imposed, the Court renders judgment as follows:

That the said defendants having been duly convicted of said crime, the Court now finds them Guilty thereof and as a punishment therefor, does now

ORDER, ADJUDGE AND DECREE that said defendant, Gus B. Greenbaum, be committed to the custody of The Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary or other penal institution,

for the term of four (4) years, said term of imprisonment to date from December 11, 1934, and that he be fined the sum of One Thousand Dollars ($1,000.00), said fine to be collected on execution, and does now further

ORDER, ADJUDGE AND DECREE that said defendant, Charles Greenbaum, be committed to the custody of The Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary or other penal institution for the term of four (4) Years, said term of imprisonment to date from December 11, 1934, and that he be fined the sum of One Thousand Dollars ($1,000.00), said fine to be collected on execution, and does now further

ORDER, ADJUDGE AND DECREE that said defendant, William Greenbaum, be committed to the custody of The Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary or other penal institution, for the term of four (4) Years, said term of imprisonment to date from December 11, 1934, and that he be fined the sum of One Thousand Dollars ($1,000.00), said fine to be collected on execution. [140]

Subsequently, IT IS ORDERED that the Judgment heretofore imposed herein be vacated, and the Court renders Judgment as follows:

That the said defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, hav-

ing been duly convicted of said crime, the Court now finds them Guilty thereof and as a punishment therefor and as a punishment therefor, does now

ORDER, ADJUDGE AND DECREE that said defendant, Gus B. Greenbaum, be committed to the custody of The Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary or other penal institution, for the term of four (4) Years, said term of imprisonment to date from December 11, 1934, and that he pay the costs of prosecution, and does now further

ORDER, ADJUDGE AND DECREE that said defendant, Charles Greenbaum, be committed to the custody of The Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary or other penal institution, for the term of four (4) years, said term of imprisonment to date from December 11, 1934, and that he pay the costs of prosecution, and does now further

ORDER, ADJUDGE AND DECREE that said defendant, William Greenbaum, be committed to the custody of The Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary or other penal institution, for the term of four (4) years, said term of imprisonment to date from December 11, 1934, and that he pay the costs of prosecution,

Appeal Bond of each of the Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, are now presented to the Court by their counsel, Messrs. Baker and Whitney, by L. B. Whitney, Esquire, executed on the 5th day of December, [141] 1934, in the sum of Five Thousand Dollars ($5,000.00), with Commercial Standard Insurance Company, a corporation, as surety thereon, and

IT IS ORDERED that said Bonds be and the same are hereby accepted and approved.

Duane Bird, Esquire, now presents Application for Probation as to Defendant, A. E. Sanders.

F. E. Flynn, Esquire, Assistant United States Attorney, represents to the Court that Postal Inspector would not oppose, but would recommend said application, and

IT IS ORDERED that said Application for Probation as to Defendant, A. E. Sanders, be granted; that imposition of Judgment be suspended, and that Defendant, A. E. Sanders be admitted to probation for the term of three (3) years from and after this date.

IT IS FURTHER ORDERED that said Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, be released on appeal bonds, heretofore approved.

L. B. Whitney, Esquire, now moves to exonerate Bail Bond of each of the Defendants, Gus B.

Greenbaum, Charles Greenbaum, and William Greenbaum, and

IT IS ORDERED that said Motion be granted.

C-4879

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. E. SANDERS,
GUS B. GREENBAUM, and
CHARLES GREENBAUM, and
WILLIAM GREENBAUM,

Defendants.

ORDER ADMITTING DEFENDANT UPON PROBATION

On the 13th day of November, 1934, the Defendant, A. E. Sanders, in the above entitled action, entered a plea of nolo contendere to Count One of an Indictment charging him with [142] a violation of Section 338, Title 18, United States Code Annotated, unlawfully and *felonisously* using the mails to defraud by having devised a scheme and artifice for obtaining money by means of false and fraudulent representations to procure said money unlawfully through correspondence by placing said correspondence in an envelope and depositing the same in a United States Post Office, at Phoenix, in the District of Arizona, for delivery as directed,

committed on or about April 9, 1930. Subsequently, on the 5th day of December, 1934, an application was made for suspension of imposition of Judgment and to admit said defendant upon probation. It appearing to the Court that the ends of Justice and the best interests of the public, as well as the defendant, will be subserved, by admitting said defendant upon probation.

WHEREFORE, IT IS HEREBY ORDERED that the imposition of judgment and sentence be and the same is hereby suspended and the defendant is admitted to probation for the term of three (3) Years from and after this date.

The terms and conditions upon which this order is based are as follows: That the defendant do not violate any penal act or statute State or Federal during the period of probation and otherwise conduct himself as a lawabiding citizen. That the defendant remain within the District of Arizona and not depart therefrom without leave of this Court.

Will F. Murdoch, Post Office Building, Tucson, Arizona, is hereby appointed as probation officer in this case. That the defendant report immediately to said Will F. Murdoch and at such times and places thereafter as he may designate; that should the defendant violate the terms and conditions upon which this order is based that he be immediately rearrested, brought before this Court, this order admitting him to probation vacated and judgment and sentence be thereupon pronounced against him. [143]

This case is continued from term to term to enable the Court to retain jurisdiction for the purpose of entering any further order that may become necessary.

DONE IN OPEN COURT this 5th day of December, 1934, At Phoenix, Arizona.

F. C. JACOBS.

Judge, United States District Court, for the District of Arizona. [144].

Minute Entry of
TUESDAY, DECEMBER 11, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

It appearing to the Court that many of the Exhibits that are necessary to be reviewed by the Circuit Court of Appeals to enable the Court to determine the questions presented on appeal in this case, are too voluminous and bulky to be incorporated in the Bills of Exceptions,

IT IS ORDERED that the Bill of Exceptions shall contain a reference to said exhibits, and a brief description thereof, and

IT IS FURTHER ORDERED that said exhibits be forwarded to the Clerk of the Circuit

Court of Appeals in their original form and filed with him as a part of the record of this case, to be available to and considered by the Circuit Court of Appeals in reviewing the record. [145]

Minute Entry of
WEDNESDAY, JANUARY 9, 1935.

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding.

[Title of Cause.]

F. E. Flynn, Esquire, Assistant United States Attorney, appears for the Government.

Messrs. Baker and Whitney, by L. B. Whitney, Esquire, appear as counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum.

Upon motion of counsel for said Defendants, counsel for the Government consenting thereto,

IT IS ORDERED that the Order heretofore entered December 11, 1934, directing the Clerk to forward original exhibits upon appeal herein to the United States Circuit Court of Appeals, be and the same is hereby vacated, as to all exhibits excepting Government's Exhibit Number 14. [146]

[Title of Court and Cause.]

ORDER TO TRANSMIT ORIGINAL EXHIBIT

It is hereby ordered that the Clerk of the United States District Court for the District of Arizona transmit to the Circuit Court of Appeals for the Ninth Circuit Government's Exhibit 14, being application for permit made to the Arizona Corporation Commission, together with attached documents, in its original form as part of the record on appeal.

Dated Jan. 9th. 1934

F. C. JACOBS
United States District Judge, for the District of Arizona.

[Endorsed]: Filed JAN 9 1935 [147]

Minute Entry of
FRIDAY, DECEMBER 21, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

Upon motion of L. B. Whitney, Esquire, of counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum,

IT IS ORDERED that said Defendants be allowed thirty (30) days from the date of filing Notice

of Appeal, within which to prepare, serve and file Bill of Exceptions, as provided in Rule IX of the Rules of the Supreme Court of the United States, Rules of Practice and Procedure. [148]

[Title of Court and Cause.]

ORDER EXTENDING TIME OF DEFENDANTS-APPELLANTS WITHIN WHICH TO PREPARE, FILE AND SETTLE BILL OF EXCEPTIONS.

Upon Motion of Defendants-Appellants in the above entitled cause for an order extending time within which to prepare, file and settle Bill of Exceptions:

It appearing to the Court that Defend*a*nts-Appellants in accordance with Rule III of the Rules of Practice and Procedure in Criminal Cases, promulgated by the United States Supreme Court on May 7th, 1934, and effective September 1st, 1934, have duly taken their appeal on the 5th day of December, 1934, and it appearing to the Court that Defendants-Appellants are entitled to thirty days after the taking of the appeal to procure to be settled and filed with the Clerk of this Court their Bill of Exceptions, excluding Sundays and Legal Holidays, whether under Federal or State Law, as provided in Rule XIII of the Rules of the United States Supreme Court above mentioned; and it further appearing that there are six Sundays and Legal Holidays intervening;

NOW, THEREFORE, on consideration of the premises, it is ORDERED that the time within which the Defendant-Appellants shall procure to be settled and filed with the Clerk of this Court their Bill of Exceptions is hereby fixed at and extended to the 11th day of January, 1935 [149] which is thirty days after the taking of the appeal, excluding Sundays and Legal Holidays, whether under Federal Law or under the Law of the State of Arizona.

Dated at Phoenix, Arizona, this 22nd day of December, 1934.

F. C. JACOBS,
Judge. [150]

[Endorsed]: Filed DEC 22 1934 [151]

Minute Entry of
MONDAY, JANUARY 7, 1935.

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding.

[Title of Cause.]

F. E. Flynn, Esquire, Assistant United States Attorney, appears for the Government. Messrs. Baker and Whitney, by L. B. Whitney, Esquire, appear as counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum.

Upon motion of L. B. Whitney, Esquire,

IT IS ORDERED that said counsel be allowed to sign proposed Bill of Exceptions heretofore filed herein. [152]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 23rd day of October, 1933, the above entitled cause came on for hearing on the separate motions of defendants, and each of them, duly made, to quash the indictment herein upon the ground that said indictment was not presented and returned to the court as provided by law, for the reason it was not presented to the court in the presence of all of the members of the Grand Jury that found the same, one of the grand jurors, H. J. Peterson, having been unlawfully excused by the foreman of said Grand Jury and being not present in court when said indictment was presented by the foreman of said Grand Jury to the Court, as shown by the Grand Jury Report made on February 28, 1933, which report abstracted to the issue, is as follows:

Come now the Grand Jury duly empaneled and sworn in this term of court, all members present except H. J. Peterson. Whereupon, their Foreman reports that he has excused said Grand Juror this date and it is ordered that the said H. J. Peterson be excused from being present at this report. There-

upon said Grand Jury by and through their foreman report that [153] they have found seventy-three true bills, (including the indictment in this cause) and that twelve or more of their number have concurred in the finding of said indictments.

The Court, on the 22nd day of November, 1933, denied the motion of each of said defendants to quash the indictment, to which ruling defendants, and each of them, then and there duly excepted.

Thereupon, and on the same date, to-wit, October 23, 1933, the cause came on for hearing on the separate demurrers of the defendants, and each of them, to the indictment, and thereafter, upon the 25th day of November, 1933, the Court entered an order sustaining the demurrers of defendants to Counts 2 to 17, inclusive, of the indictment, and overruled the demurrers of defendants, and each of them, to Count 1 of the indictment, to which ruling on Count 1, the defendants, and each of them, then and there duly excepted.

Thereafter, on the 7th day of November, 1934, the above cause came on for trial and a jury was duly and regularly empaneled and sworn, and the trial commenced on the said 7th day of November, 1934. Clifton Mathews, United States Attorney for the District of Arizona, and Frank E. Flynn and John Dougherty, Assistant United States Attorneys, appearing for the plaintiff, United States of America; and the defendant A. E. Sanders being present in person and being represented by his at-

torney, Duane Bird; and the defendants Gus B. Greenbaum, Charles Greenbaum and William Greenbaum being present in person and being represented by their attorneys Alexander B. Baker, Louis B. Whitney, Lawrence L. Howe and Theodore E. Rein, and the parties having announced ready for trial, John B. Ryan was thereupon duly sworn as shorthand reporter. [154]

Whereupon, the first count of the indictment having been read to the jury, the United States Attorney declined to make an opening statement of what the Government expected to prove, the defendants Gus B., Charles and William Greenbaum, and each of them, through their counsel, likewise declined to make an opening statement.

Thereupon, the defendants Gus B., Charles and William Greenbaum, through their counsel, duly objected to the introduction of any evidence upon the ground that the indictment failed to state an offense under Section 215 of the United States Penal Code, or under any other section of the United States Statutes, and that said indictment was duplicitous, vague and uncertain. The Court overruled the said objection, to which ruling the defendants Gus B., Charles and William Greenbaum then and there duly excepted.

Whereupon, United States of America, plaintiff, to sustain the issue on its part, called

J. E. JOHNSON

as a witness on behalf of the Government, and said J. E. Johnson testified as follows:

I am Assistant Secretary and Examiner of the Arizona Corporation Commission. I have with me certain instruments filed in the office of the Commission relating to Clarence Saunders Stores, Inc., an Arizona corporation.

Thereupon the Government offered in evidence the Articles of Incorporation, and three amendments to the Articles of Incorporation, of Clarence Saunders Stores, Inc., which were received in evidence and marked Government's Exhibits Nos. 1, 2, 3 and 4, respectively.

Exhibit 1, abstracted to the issue, is as follows:

Articles of Incorporation of Clarence Saunders Stores, Inc., dated and acknowledged October 18, 1928, filed with the Arizona Corporation Commission October 25, 1928, at the request [155] of Duane Bird, of Nogales, Arizona. Incorporators: A. E. Sanders and E. B. Horne, of Nogales, Arizona. Authorized Capital Stock: 15,000 shares preferred, par value $100.00 each; 300,000 shares of common without nominal or par value. Provides for $8.00 per share, or 8% per annum of the amount of par value; dividends on preferred stock "payable out of any and all surplus or net profits, quarterly, half-yearly, yearly, as and when declared

(Testimony of J. E. Johnson.)

by the Board of Directors, before any dividends shall be declared, set apart, or paid upon the common stock of the corporation". Dividends cumulative. Board of Directors: not less than 3 nor more than 7. Duane Bird of Nogales, Arizona, Statutory Agent. Business to be transacted: To carry on and engage in the business of establishing, maintaining and operating 'Clarence Saunders Sole Owner of My Name' Stores; and other mercantile business, with usual powers given to corporations.

Exhibit 2, abstracted to the issue, is as follows:

Certificate of Amendment to Articles of Incorporation, dated January 2, 1929; executed by A. E. Sanders, as President, and E. B. Horne, as Secretary, filed in the office of the Corporation Commission at the request of Duane Bird, of Nogales, Arizona, on January 11, 1929, amending Article II by changing the name of the corporation to "Arizona Clarence Saunders Stores, Inc.".

Exhibit 3, abstracted to the issue, is as follows:

Certificate of Amendment to Articles of Incorporation of Arizona Clarence Saunders Stores, Inc., dated January 21, 1930, signed by A. E. Sanders, as President, and J. M. Nixon, as Secretary. Filed in the office of the Corporation Commission at the request of Baker & Whitney, of Phoenix, Arizona, on January 23,

(Testimony of J. E. Johnson.)

1930, amending Articles II, V and IX, changing the name of the corporation to "United Clarence Saunders Stores, Inc.; changing the capital stock set-up to 50,000 shares of preferred stock of the par value of $100.00 each, and 500,000 shares of common stock without nominal or par value; and increasing the highest amount of indebtedness to which the corporation shall at any time subject itself to $3,300,000.00. [156]

Exhibit 4, abstracted to the issue, is as follows:

Certificate of Amendment to Articles of Incorporation of United Clarence Saunders Stores, Inc., dated November 1, 1930, signed by H. D. Sanders, as President, and G. C. Partee, as Secretary. Filed in the office of the Corporation Commission on November 24, 1930, at the request of Baker & Whitney, Phoenix, Arizona, amending Article II, changing the name of the corporation to "United Sanders Stores, Inc."

The witness resumed: I have the corporate records of the Piggly-Wiggly Holding Corporation, the U-Save Holding Corporation, and the Bond and Mortgage Corporation.

Thereupon the Government offered in evidence the Articles of Incorporation of the Piggly-Wiggly Holding Corporation of Yuma, which was received in evidence and marked Government's Exhibit 5, which abstracted to the issue is as follows:

(Testimony of J. E. Johnson.)

Articles of Incorporation of Piggly-Wiggly Holding Corporation of Yuma, dated April 27, 1929, and filed in the office of the Arizona Corporation Commission on May 15, 1929, at the request of Wm. H. Westover, of Yuma, Arizona. Incorporators: H. D. Sanders and S. I. Haley, both of Yuma, Arizona. Authorized Capital Stock: 60,000 shares of Class A common and 60,000 shares of Class B common, both without nominal or par value, and 30,000 shares of preferred stock at $100.00 each. Provides for 7% per annum dividends on preferred stock. Officers named in articles of incorporation: H. D. Sanders, President and Director; Philip Thorp, Vice-President and Director; S. I. Haley, Secretary-Treasurer and Director. Principal Business: To own and operate retail mercantile stores at such places as the company may deem proper, etc.

The Greenbaum defendants duly objected to the introduction of Government's Exhibit 5 because it was not shown to have any connection or relation with any of the Greenbaum defendants, and that it was hearsay, but the Court overruled said objection with the statement that he supposed the Government would connect it up later, to which ruling counsel for de- [157] fendants then and there duly excepted.

(Testimony of J. E. Johnson.)

Thereupon the Government offered a Certificate of Amendment of the Articles of Incorporation of the Piggly-Wiggly Holding Corporation of Yuma, which was received in evidence and marked Government's Exhibit 6, which abstracted to the issue, is as follows:

> Certificate of Amendment of Articles of Incorporation of Piggly-Wiggly Holding Corporation of Yuma, dated February 19, 1930, filed in the office of the Arizona Corporation Commission at the request of Wm. H. Westover of Yuma, Arizona, on February 24, 1930. Certificate signed by H. D. Sanders and S. I. Haley. The purpose of certificate was to change the name of the corporation to "U-Save Holding Corporation".

The Greenbaum defendants duly objected to the receiving of said Exhibit in evidence because it had no connection or relation with any of the Greenbaum defendants, and that it was hearsay, but the Court overruled said objection, to which ruling counsel for defendants then and there duly excepted.

Thereupon the Government introduced in evidence Articles of Incorporation of Bond and Mortgage Corporation, marked Government's Exhibit 7, which abstracted to the issue, is as follows:

> Articles of Incorporation of Bond & Mortgage Corporation, dated May 1, 1929, filed in

(Testimony of J. E. Johnson.)

the office of the Arizona Corporation Commission May 1, 1929, at the request of Baker & Whitney, Phoenix, Arizona. Incorporators: L. B. Whitney and Alexander B. Baker. Capital Stock: 1,000 shares without nominal or par value. Business of corporation: to deal in stocks, bonds, debentures, mortgages, etc.

Thereupon the Government offered in evidence the Articles of Incorporation of Piggly-Wiggly Southwestern Company, which was received in Evidence as Government's Exhibit 8, and which abstracted to the issue, is as follows:

Articles of Incorporation of Piggly-Wiggly Southwestern Company, dated July 9, 1927. Filed in the office of the Arizona Corporation [158] Commission July 13, 1927, at the request of Duane Bird, of Nogales, Arizona. Incorporators: A. E. Sanders and Leila Sanders, of Nogales, Arizona. Capital Stock: $200,000.00, divided into 10,000 shares of common stock at $10.00 par value, and 1,000 shares of preferred stock at $100.00 par value. Business proposed to be transacted: To carry on and engage in the business of establishing, maintaining and operating "Piggly-Wiggly" stores; to deal in groceries, provisions, etc.

The Greenbaum defendants duly objected to the receiving of said Exhibit in evidence because there was nothing in connection with that company

(Testimony of J. E. Johnson.)
charged in the indictment, and for the further reason that the defendants Greenbaum were not shown to have had anything to do with said company, but the Court overruled said objection, to which ruling counsel for defendants then and there duly excepted.

Thereupon the Government introduced in evidence the annual report of the Arizona Clarence Saunders Stores, Inc., as of the close of business May 31, 1929, marked Government's Exhibit 9, which abstracted to the issue, is as follows:

> Annual Report of Arizona Clarence Saunders Stores, Inc., at the close of business May 31, 1929, filed in the office of the Arizona Corporation Commission July 1, 1929, at the request of Arizona Clarence Saunders Stores, Inc., Post Office Box 2587, Tucson, Arizona. Executed and sworn to by A. E. Sanders, President, and E. B. Horne, Secretary, on June 29, 1929, at Nogales, Santa Cruz County, Arizona. This report shows:

(Testimony of J. E. Johnson.)

Assets	$454,280.96
Liabilities	19,024.62
Accumulations	2,516.93
Amount of Capital Stock— Paid up and issued	432,739.41
Real Property at Tucson— 7 stores, 1 warehouse	leased
Real Property at Phoenix— 3 stores, 1 warehouse	leased
Personal Property: Phoenix and Tucson — fixtures and equipment	50,641.73
Merchandise Stocks	70,115.88

[159]

The defendants Greenbaum duly objected to the receiving of said annual report in evidence because they were not shown to have any connection with such annual report, and that it was hearsay, but the Court overruled said objection, to which ruling counsel for defendants Greenbaum then and there duly excepted.

Thereupon the Government offered in evidence the annual report of United Clarence Saunders Stores, Inc., as of May 31, 1930, marked Government's Exhibit 10, and which abstracted to the issue, is as follows:

(Testimony of J. E. Johnson.)

Annual Report of United Clarence Saunders Stores, Inc., at close of business May 31, 1930, filed in the office of the Arizona Corporation Commission June 30, 1930, at the request of the company, whose address is given at 305 South Second Avenue, Phoenix, Arizona. Report was sworn to and executed in Maricopa County, Arizona, by A. E. Sanders, as President, and J. M. Nixon, as Secretary, on June 25, 1930. Report shows:

Assets	$1,125,101.14
Liabilities	158,687.26
Accumulations	296,603.88
Amount of Capital Stock Paid up and Issued	669,810.00
Real Property	None
Personal Property	518,089.55
Divided into fixtures and Equipment, Tucson and Phoenix Arizona $173,947.03	
Merchandise Inventories at Phoenix and Tucson Warehouses, and at Phoenix, Tucson, Prescott, Mesa and Benson Stores 344,142.52	

The Greenbaum defendants duly objected to the receiving of said annual report in evidence because it was hearsay as to the Greenbaums, but the Court

(Testimony of J. E. Johnson.)

overruled said objection, to which ruling counsel for the defendants then and there duly excepted.

Thereupon the Government introduced in evidence two annual reports of the Bond and Mortgage Corporation, one [160] having been filed June 28, 1929, and the other June 28, 1930, marked Government's Exhibits 11 and 12, respectively. Exhibits 11 and 12 abstracted to the issue, are as follows:

> Annual Report of Bond and Mortgage Corporation, dated, executed and sworn to June 26, 1929, by Wm. Greenbaum as President, and G. B. Greenbaum as Secretary, filed in the office of the Arizona Corporation Commission June 28, 1929, at the request of Baker & Whitney, Phoenix, Arizona. Report shows no business except organization and that in addition to the President and Secretary mentioned, Charles Greenbaum is Vice-President. The address of the office is given as 700 Security Building, Phoenix, Arizona.
>
> Annual Report of Bond and Mortgage Corporation at close of business May 27, 1930. Executed and sworn to in Maricopa County, Arizona, by Wm. Greenbaum, as President, and G. B. Greenbaum, as Secretary, on June 30, 1930. Filed in the office of the Arizona Corporation Commission on June 30, 1930, at the request of Bond and Mortgage Corporation,

(Testimony of J. E. Johnson.)

whose address is given as Security Building, Phoenix, Arizona. Shows same officers as Exhibit 11, and the following:

Assets	$77,939.17
Liabilities	71,362.25
Accumulations	18,724.77
Real Property	None
Personal Property: Securities	31,934.19
Furniture & Fixtures	1,090.25
Amount of Capital Stock Paid up and Issued	25,301.69

Thereupon the Government introduced in evidence the annual report of the U-Save Holding Corporation at the close of business as of June 30, 1930, marked Government's Exhibit 13, and which abstracted to the issue, is as follows:

Annual Report of U-Save Holding Corporation (formerly Piggly-Wiggly Holding Corporation) at the close of business June 30, 1930, executed and sworn to in Yuma County, Arizona, by H. D. Sanders, as President, and S. Idelle Haley, as Secretary, July 22, 1930; filed in the office of the Arizona Corporation Commission July 23, 1930, at the request of Piggly-

(Testimony of J. E. Johnson.)

Wiggly Yuma Co. Shows: [161]

Assets	$956,662.59
Liabilities	9,915.47
Accumulations	504,767.22
Amount of Capital Stock Paid up and Issued	337,070.00
Stock contracts	104,910.00
Real Property Owned:	
Situate—	
Yuma, Ariz.	42,927.21
San Diego, Cal.	1,300.00
Somerton, Ariz.	5,000.00
El Centro, Calif.	21,179.68
Personal Property—Situate:	
Yuma, Arizona: Stock, fixtures & merchandise	7,177.47
Warehouse equipment and merchandise	87,445.81
Piggly-Wiggly stock	130,695.00
Imperial, California.	
Store: fixtures & merchandise	9,506.43

Officers, in addition to the President and Secretary, are given: Vice-Presidents, Philip H. Thorp and C. L. Patterson. The addresses of all the officers are given as Yuma, Arizona, except Philip H. Thorp, whose address is given as San Bernandino, California.

(Testimony of J. E. Johnson.)

The defendants Greenbaum duly objected to the receiving of said annual report in evidence because there was no connection shown between that company and the Greenbaums, as shown by the allegations in the indictment, but the Court overruled said objection, to which ruling counsel for the defendants then and there duly excepted.

Thereupon the Government introduced in evidence a file containing the application for permit made to the Arizona Corporation Commission, together with the permit, which was issued thereon, to the Clarence Saunders Stores, Inc., being Permit No. 6225, marked Government's Exhibit 14, and which abstracted to the issue is as follows:

Permit No. 6225, Investment Company No. 2383, issued by the Arizona Corporation Commission to Clarence Saunders Stores, Inc., stating that company has complied with the provisions of Title 9, Chapter 9, Revised Statutes of Arizona, 1913, Civil Code, and the amendments thereto, and "that detailed information in regard to the company and its security is on file in the [162] office of the Arizona Corporation Commission for public inspection and information, and that said company is permitted to do business in the State of Arizona;

Now, therefore, by virtue of the powers in it vested by the Constitution and the Laws of the State of Arizona, the Arizona Corporation Com-

(Testimony of J. E. Johnson.)

mission does hereby grant and give unto the said Clarence Saunders Stores, Inc., PERMISSION:

"To issue and sell 1,500 shares of its preferred capital stock at $100.00 per share, and 50,000 shares of its no par common capital stock at *$1,00* per share.

IT IS ORDERED: That a commission of not to exceed 20% may be paid on such sale of stock.

IT IS FURTHER ORDERED: That the applicant be and the same is hereby authorized to issue 151,000 shares of no par common stock to Mr. A. E. Sanders in consideration of the transfer by him to the corporation of his license and franchise to operate 'Clarence Saunders Sole Owner of My Name' food stores in Arizona and New Mexico, except Eddy and Dona Ana Counties, and the agreement for the purchase of 'Cashway Markets' in Tucson, Arizona, as set forth in the application for this permit.

Permission to issue and sell securities hereunder expires June 30, 1929."

The balance of this permit provides for the company mailing to the Commission a statement verified by its President or Secretary showing the number of shares sold, the rate at which sold, and the amount of money received therefor, together with an itemized report of all disbursements. It further provides that in no event shall securities be sold where less than 25% of the total purchase

(Testimony of J. E. Johnson.)

price is paid in cash, and that the remaining 75% be covered by a contract calling for the payment of definite sums at stated intervals not to exceed six months from the date of sale. It further provides that a copy of all advertising by and on behalf of the company shall be mailed to the Commission by midnight of the day such advertising is first published, and that a true copy of the permit be exhibited to each prospective subscriber or purchaser of securities authorized to be sold under the permit. It provides that every agent selling the securities mentioned in the permit must register with the Commission. The permit is dated December 26, 1928, and is given under the hand and seal of the Arizona Corporation Commission.

Application for Permit executed by A. E. Sanders and [163] E. B. Horne, and sworn to on December 15, 1928, at Nogales, Arizona. This application shows that a qualifying share of stock was issued to each of the following persons: A. E. Sanders, E. B. Horne, and Lelia Sanders, and that there was a balance unissued of 299,997 shares. The application provides in part:

"It is desired to issue 151,000 shares of no par common stock to Mr. A. E. Sanders in consideration of the transfer by him to the corporation of his license and franchise to operate 'Clarence Saunders, Sole Owner of My Name' food stores in Arizona and New Mexico, excepting Eddy and Dona

(Testimony of J. E. Johnson.)

Ana Counties, and the agreement for the purchase of 'Cashway Markets' in Tucson, Arizona."

Permission is sought by this application to pay a brokerage or commission of not to exceed 20% on sales of stock to the public at large. The application states that Mr. Sanders has been in the grocery business for more than twenty years and is president of Piggly-Wiggly Southwestern Co. "which is now successfully operating Piggly-Wiggly stores in Cochise and Santa Cruz Counties, Arizona, and that Mr. Horne has been associated in the management of the Piggly-Wiggly Southwestern Co. for six months, and had been previously engaged for eighteen years in the lumber business in Arkansas. The application also states that all correspondence in connection with the company should be addressed to Duane Bird, Attorney-at-Law, Nogales, Arizona.

This application has attached to it minutes of the meeting of Clarence Saunders Stores, Inc., held November 28, 1928, (The minutes do not show that any of the Greenbaum defendants were present). Attached also to the application is a copy of the agreement between A. E. Sanders and the Cashway Markets, Inc., and a copy of the contract for license to operate "Clarence Saunders, Sole Owner of My Name" food stores, between A. E. Sanders and Clarence Saunders Corporation, a Delaware Corporation, with its principal place of business at Memphis, Tenn., which was executed on the 28th

(Testimony of J. E. Johnson.)

day of September, 1928, and acknowledged on the same day by both A. E. Sanders and Clarence Saunders as President of the Clarence Saunders Corporation. This contract provides in effect as follows:

Licensee agrees:

"To install such standard store equipment in detail in each store to be operated under this agreement as may be required by licensor the same to be purchased from Licensor at standard prices which shall be in effect at the time of shipment, except those items which the Licensor shall instruct to be purchased elsewhere by the Licensee. [164]

"To have placed in each store in the particular way and position as shall be directed by the Licensor a large sign of the dimensions as shall be designated by the Licensor, on which shall appear the trade-name "CLARENCE SAUNDERS, Sole Owner of My Name", as prescribed by the Licensor.

"To not allow any other name or sign to appear in conjunction with the said trade-name or independently of it, either on the exterior of any store, inside of any store, or in any newspaper advertising, and to not refer in any public way whatsoever to any store operated under this agreement by any name or sign other than the said trade-name "CLARENCE SAUNDERS, Sole Owner of My Name," * * *

"To not form any agreement or corporation, directly or indirectly, with any business competitive

(Testimony of J. E. Johnson.)

with that of the store or stores operated under this agreement, as to the retail prices of merchandise whether such agreement or combination be oral, written, or implied. * * *

"To make weekly reports to the Licensor of the sales of each Department of each store operated under this agreement, and to make such monthly or other reports relating to any phase of the business as may be required by the Licensor, and in making such reports to do so in such manner and on the forms as shall be prescribed by the Licensor.

"The Licensor shall have authority through any of its representatives at any time to inspect any store operated hereunder, including its merchandise, and shall have the further authority to inspect and audit the records of the Licensee and obtain therefrom such information and reports as may seem desirable to the Licensor.

"To pay the Licensor promptly, according to its terms of sale, for all merchandise and/or store equipment sold by it to the Licensee from time to time * * * .

"To have established and in operation one store under this agreement by January 1, 1929; one store every thirty days thereafter till twenty-five stores are established—entire twenty-five stores to be established by January 1, 1931, and to operate continuously the store or stores so specified for as long a time as this contract may be in full force and effect. * * *

(Testimony of J. E. Johnson.)

"The Licensee, in consideration of this agreement, shall pay to the Licensor a monthly license fee of one-half of one per cent on the gross sales of each department of each store operated under this agreement for so long a time as the said store shall be operated by the Licensee. The payment of said license fee shall be made not later than the 10th day of each month on the sales for the preceding month. * * * [165]

The Licensor agrees:

"To furnish the Licensee in accordance with the schedule named below:

"Plans and specifications for each store building; instructions as to all changes and the remodeling that shall be required in each instance; design for the color scheme to be put on each store front; design for the trade-name that shall be inscribed on show windows and on the walls of the building; a detailed list with a standard description of all fixtures that shall be required for each store, and a price of each item at which the Licensor will sell it to the Licensee; a floor plan showing the position of, and instructions for the installation of each store fixture; arrangement plan for the display of all merchandise; standard advertising copy that shall be used for the opening announcement of the first store that shall be established; advertising copy and instructions as to its use in the operation of the stores; a list describing the merchandise assort-

(Testimony of J. E. Johnson.)

ment that shall be handled by each department of a store; information as a guide for the purchasing of merchandise, how to assemble and distribute; instructions as to the means and methods that shall be used in accounting, and for keeping all necessary records in merchandising and store operation; instructions as to the standard rules and regulations that shall govern in the establishment, maintenance and operation of the stores, and instructions as to all other standard rules and regulations which are contemplated by this agreement."

(NOTE: This License agreement covers over six pages of typewritten legal-cap, single spaced, and has every proviso contained therein that the ingenuity of man could devise.) [166]

Thereupon the Government introduced in evidence Permit No. 6310, together with the application therefor, and the file of the Arizona Corporation Commission relating thereto, which was marked Government's Exhibit 15, and which abstracted to the issue, is as follows:

> Arizona Corporation Commission amended Permit No. 6310, Investment Company No. 2383, issued to Arizona Clarence Saunders Stores, Inc., in same form as Permit No. 6225, granting the following permission:
>
> "To issue and sell 10,000 shares of its preferred stock at $100.00 per share, and 80,000 shares of its no par common stock at $5.00 per share.

(Testimony of J. E. Johnson.)

IT IS ORDERED: That a commission of not to exceed 20% may be paid for the sale of the stock."

This permit is dated March 22, 1929, and expired June 30, 1929, and is under the hand and seal of the Arizona Corporation Commission. Attached to the permit is an application in the form of a letter from Duane Bird, Attorney at Law, Nogales, Arizona,. dated March 19, 1929, addressed to the Arizona Corporation Commission, reading as follows:

"Kindly treat this letter as an application of the Arizona Clarence Saunders Stores, Inc. for a permit to issue ten thousand (10,000) shares of its preferred capital stock at $100.00 per share, and eighty thousand (80,000) shares of its no-par common stock at $5.00 per share. I am sending my check herewith in the sum of $164.90 to cover your fee for this permit.

The application on file in connection with Permit No. 6225 contains all the information required by you for a formal application except for a current financial statement and I am sending you herewith the company's last statement. As set forth in the application for Permit No. 6225 the plan of development of the company was to establish 'Clarence Saunders, Sole Owner of My Name' stores in Tucson and then proceed with the installation of

(Testimony of J. E. Johnson.)

stores in other parts of the territory covered by the company's franchise. The stock issue authorized in said Permit No. 6225 has been over-subscribed and the Tucson program has been financed and launched; and the company desires now to finance the installation of fifteen stores and a warehouse in Phoenix. Locations for the Phoenix warehouse and stores are now being secured and as soon as you grant the permit for the issuance of the stock necessary to finance the program, the patented fixtures will be ordered from the Clarence [167] Saunders Corporation at Memphis, Tennessee, and the stores installed and placed in operation in Phoenix as rapidly as possible.

Yours very truly,

(Signed) DUANE BIRD."

Financial statement attached to this letter shows:

Assets	$283,202.45

Which includes $151,000.00, value of license obtained from Clarence Saunders Corporation of Memphis, Tenn.

Liabilities	$283,202.45

Divided into four items as follows:

Preferred Stock Subscribed	$113,200.00
Common Stock Subscribed	157,288.00
Accounts Payable	10,225.06
Surplus	2,389.00

(Testimony of J. E. Johnson.)

This statement is certified to on March 15, 1929, by A. E. Sanders.

Thereupon the Government introduced in evidence the files in connection with Permit No. 4854, issued to the Arizona Clarence Saunders Stores, Inc., marked Government's Exhibit 16, which abstracted to the issue, is as follows:

Arizona Corporation Commission Permit No. 4854, in identical form with Permit No. 6225, grants permission to Arizona Clarence Saunders Stores, Inc., to issue and sell "11,000 shares of its preferred stock at $100.00 per share, and 70,000 shares of its no par common stock at $7.50 per share. That a commission not exceeding 20% may be paid for the sale of preferred and common stock." The Permit was issued July 12, 1929, and expired June 30, 1930. It was given under the hand and seal of the Arizona Corporation Commission.

Attached to this exhibit is the application in the form of a letter from Duane Bird, Attorney, at Nogales, Arizona, addressed to the Arizona Corporation Commission, dated July 1, 1929, which reads as follows: [168]

"Kindly treat this letter as an application of the Arizona Clarence Saunders Stores, Inc., for a permit to issue 11,000 shares of its preferred capital stock at $100.00 per share and 70,000 shares of its no-par common stock at

(Testimony of J. E. Johnson.)

$7.50 per share. I am sending you herewith my check in the sum of $172.50 to cover your fees for this permit. I have calculated the fees on the basis of 1/100 of 1% by reason of the fact that permits have already been granted and fees paid on $1,251,000.00 as appears from your receipts Nos. 6989 and 7204. However, if the company is not entitled to calculate the fee on this basis kindly advise me of any balance due and I will remit it by return mail.

The application on file in connection with permit No. 6225 contains all the information required by you for a formal application except for a current financial statement and I am sending you herewith a copy of the last statement. The company now has in operation six stores and a warehouse at Tucson, Arizona, and three stores and a warehouse at Phoenix, Arizona. In addition thereto another store will be opened in Tucson during this month, seven Phoenix locations are under lease and buildings are in the course of construction and should be completed within sixty days, and one location in Mesa has been secured and the store building is now being completed. Fixtures for stores at these locations are now being built at the factory of the Clarence Saunders Corporation, and barring unforseen circumstances nine additional stores will be opened by the corporation by September 1, 1929.

(Testimony of J. E. Johnson.)

The company will continue to open stores as rapidly as possible until its entire territory is covered."

Attached to the above letter was a balance sheet as of May 31, 1929, showing assets of $454,280.96, and liabilities in a like amount. Included in the assets are:

"Concessions—Clarence Saunders License"	$151,000.00"
The liabilities show:	
Accounts Payable	$ 18,719.84
Accrued Royalties and compensation insurance	304.78
Preferred Stock Subscribed	381,800.00
Common Stock Subscribed	77,843.00
Common Stock issued for Clarence Saunders License	151,000.00
Total	610,643.00
Less: Due on subscriptions	177,903.59
Balance	432,739.41
Plus: Surplus	2,516.93

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which makes a full total of $454,280.96 assets.

Thereupon the Government introduced in evidence the files in connection with Permit No. 5246, issued to United Clarence Saunders Stores, Inc., and the file of the Arizona Corporation Commission thereon, marked Government's Exhibit 17, which abstracted to the issue, is as follows:

(Testimony of J. E. Johnson.)

Arizona Corporation Commission Permit No. 5246, dated March 10, 1930, given under the hand and seal of the Arizona Corporation Commission, to United Clarence Saunders Stores, Inc., which expired June 30, 1930. This permit gives permission to "issue and sell 10,000.00 shares of its no par common stock at $10.00 per share; to issue and sell $250,000.00 of its first eight per cent (8%) Serial Gold Debentures, as set forth in the application for this permit; that a commission of not to exceed 20% may be paid for each One Hundred Dollars ($100.00) of stock and/or debentures sold; that every purchaser of stock hereunder shall be furnished with a copy of this permit printed on the back of the subscription or receipt form used by the corporation; that this permit is granted in lieu of Permit Decision 4854, Docket No. 3970-B-2383, dated July 12, 1929, which authorized the sale of preferred and common stock of the applicant company, and which is no longer in force and effect."

Attached to this permit is the application of the company addressed to the Arizona Corporation Commission, dated March 5, 1930, executed and acknowledged on the same date, by A. E. Sanders, President, and J. M. Nixon, Secretary of the company. The officers of the company named in the permit, in addition to the Presi-

(Testimony of J. E. Johnson.)

dent and Secretary, are L. E. Sanders, Vice-President. A. E. Sanders, L. E. Sanders and J. M. Nixon, were all of the directors of the company. Attached to the application was a description of the physical assets in each of the retail stores, exclusive of merchandise, and a financial statement of December 31, 1929.

(This financial statement is set forth in full as Exhibit 40).

Thereupon the Government introduced in evidence the files in connection with Permit No. 5553 issued to the United Clarence Saunders Stores, Inc., together with the file, application and correspondence with the Commission, marked Government's Exhibit 18, which abstracted to the issue, is as follows: [170]

Arizona Corporation Commission Permit No. 5553, dated July 15, 1930, expired June 30, 1931, under the hand and seal of the Arizona Corporation Commission. Permission granted:

"To issue and sell 1,000 shares of its no par stock at $10.00 per share.

To issue and sell $20,000.00 of its first 8% Serial Gold Debentures.

That a commission of not to exceed 20% may be paid on each $100.00 of stock and/or debentures sold."

Attached to this permit is the application dated June 30, 1930, executed by K. C. Van

(Testimony of J. E. Johnson.)

Atta, Vice-President and G. C. Partee, Secretary, of United Clarence Saunders Stores, Inc., and acknowledged by these officers on the same date. Attached to the application is property schedule as of May 31, 1930, showing value of fixtures and physical assets, exclusive of merchandise inventories, in 19 stores and the warehouses in Phoenix and Tucson, and automobiles, of $173,947.03.

Financial statement of same date attached to application is as follows:

UNITED CLARENCE SAUNDERS STORES, INC.
FINANCIAL STATEMENT
MAY 31, 1930
ASSETS

Current Assets		
Cash	$ 23,836.23	
Accounts Receivable	135,685.99	
Inventories (at cost)		
Merchandise	344,142.52	
Supplies	1,792.81	
Total Current Assets	505,457.55	$ 505,457.55
INVESTMENTS & SECURITIES	108,200.60	108,200.60
Fixed Property Investments		
Fixtures & Equipment	163,584.65	
Automotive Equipment	10,362.93	
	173,947.03	
Less Depreciation Reserve	15,438.48	158,508.55
Carried Forward		$ 772,166.10

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(Testimony of J. E. Johnson.)

Brought Forward		$ 772,166.10
DEFERRED CHARGES		
Unexpired Insurance	4,796.57	
P—Pd Rents & Location Sites	16,600.30	
Organization & Development	36,143.00	
Trade Territory	5,606.00	
Comm.—Stock Sales	7,538.06	
Comm.—Deb. Sales	9,220.00	79,903.93
Other Assets		
Concessions	151,000.00	
Stock Subscriptions	122,030.51	273,030.51
TOTAL ASSETS		$1,125,101.14
LIABILITIES		
Current Liabilities		
Notes Payable	$ 29,306.02	
Accounts Payable	62,702.53	
Trade Acceptances	5,663.86	
Accrued Expense:		
Pay Roll	70.00	
Royalties	809.89	
Comp. Ins.	1,832.83	
Int. on Deb.	1,536.67	
Total Current Liabilities	$ 101,921.80	$ 101,921.80
Fixed Liabilities		
Purchase Contracts Payable		3,491.95
First Series 8% Gold Deb.		
Authorized	$1,000,000.00	
Unissued	953,900.00	46,100.00
RESERVES		
Insurance	$ 2,085.74	
Taxes	5,087.77	7,173.51
NET WORTH		
CAPITAL STOCK		
Preferred 8% Cumulative	$ 669,800.00	
Comm.—No Par Value Shares	10.00	

(Testimony of J. E. Johnson.)

Total Outstanding Subscribed—Not Issued Preferred 8% Cumulative Comm.—No Par Value Share	$ 222,200.00	
		[172]
TOTAL SUBSCRIPTIONS		
TOTAL CAPITAL STOCK	$ 892,010.00	
Premiums—Stock Sales	1,245.00	
Surplus 1929	51,625.33	
Profit & Loss 1930	21,533.55	
TOTAL NET WORTH	$ 966,413.88	966,413.88
TOTAL LIABILITIES & NET WORTH		$1,125,101.14

Trial Balance attached to application, same date, is as follows:

UNITED CLARENCE SAUNDERS STORES, INC.
TRIAL BALANCE, MAY 31, 1930

	Debit	Credit
Bank Account	$ 23,836.23	$
Accounts Receivable	135,685.99	
Inventories—Mdse.	344,142.52	
Inventories—Supplies	1,792.81	
Benson Location	4,337.90	
Glendale Location	2,017.40	
Tucson Location	22.50	
Prepaid Rent—Tucson	6,119.88	
Prepaid Rent—Phoenix	4,102.62	
Stocks & Bonds	108,200.60	
Unexpired Insurance	4,796.57	
Furn.—Fixtures—Equipment	163,584.05	
Automotive Equipment	10,352.98	
Commissions Paid—Stock	7,538.06	
Organization & Development	36,143.00	
Commissions Paid—Bonds	9,220.00	
Concessions	151,000.00	
Trade Territory Development	5,606.00	

(Testimony of J. E. Johnson.)

	Debit	Credit
Notes Payable		29,306.02
Trade Acceptances Payable		5,663.86
Cond. Sales Contracts		3,491.95
Accounts Payable		62,702.53
Interest Accrued—Bonds		1,536.67
Accrued Pay Roll		70.00
Accrued Royalties		809.89
Accrued Comp. Insurance		1,832.83
Accrued Taxes		5,037.77
Reserve—Depreciation		15,438.48
Reserve Insurance		2,085.74
Preferred C. Stock Authorized		5,000,000.00
Preferred C. Stock Unissued	4,108,000.00	
Common Stock Authorized		10.00
Premiums Paid on C. Stock		1,245.00
Surplus 1929		51,625.33
		[173]
Subscriptions—Receivable	$ 122,030.51	$
Bonds—Authorized		1,000,000.00
Bonds—Unissued	953,900.00	
Stores Ledger Control		21,533.55
	$6,202,439.62	$6,202,439.62

Distribution of Funds, as of the same date, shows:

UNITED CLARENCE SAUNDERS STORES, INC.
PHOENIX, ARIZONA

DISTRIBUTION OF FUNDS—MAY 31, 1930

Proceeds of Stock Sales turned into Treasury—Total Net Sales		$ 691,638.40
Less: Exchanged for other stocks and bonds		140,219.54
Net amount turned into Treasury		$ 551,418.86
DISTRIBUTION:		
Fixed Property Investment	$ 173,947.03	
Prepaid Rents & Locations	16,600.30	
Inventories	344,142.52	
Cash on Hand	23,836.23	
	$ 558,526.08	

(Testimony of J. E. Johnson.)

Thereupon the Government introduced in evidence Annual Report of United Clarence Saunders Stores, Inc., for the fiscal year ending June 30, 1930, marked Government's Exhibit 19, which abstracted to the issue is as follows:

> Annual Report of United Clarence Saunders Stores, Inc., to Arizona Corporation Commission, for the year ending May 31, 1930, subscribed and sworn to by A. E. Sanders, President. This report is substantially the same as the financial statement of May 31, 1930, a part of Exhibit 18. [174]

Thereupon the Government introduced in evidence application for license as a dealer in securities by the Bond and Mortgage Corporation, together with Dealer's Permit, marked Exhibit No. 20, which abstracted to the issue is as follows:

> Application of Bond and Mortgage Corporation for permit to deal in securities under the provisions of Article II, Chapter 38, Revised Code of Arizona, 1928. Proposes to sell $472,500.00 common and preferred stock of Arizona Clarence Saunders Stores, Inc., divided into 17,500 shares of common at $7.50 per share, and 3,500 shares of preferred at $100.00 per share. Application signed by Wm. Greenbaum, President, and G. B. Greenbaum, Secretary. Application verified by above named officers.

(Testimony of J. E. Johnson.)

Dealers in Securities Permit No. 13, under the hand and seal of the Arizona Corporation Commission granting the application. Six applications for licenses as agents signed by Bond and Mortgage Corporation for the following agents: Charles, William, Gus and S. M. Greenbaum, Joseph Rose and Marco Messina.

The witness resumed: I made a search in the files of the Commission for all permits and annual reports made to the Commission by these companies and as far as the record shows that is all there is on file with the Commission.

CROSS EXAMINATION

Examining Government's Exhibit 14, Permit No. 6225 from the Arizona Corporation Commission, will state that the permit does not require the pooling in escrow of the 151,000 shares of stock. If the Corporation Commission had made this requirement it would have been contained in the permit unless a special order was subsequently made, and there is nothing in the files indicating that such order was ever made.

Whereupon

J. M. NIXON,

called as a witness on behalf of the Government testified: [175]

About the 1st of January, 1929, I became connected with the Arizona Clarence Saunders Stores. In January 1930 I was elected Secretary and Treasurer.

(Testimony of J. M. Nixon.)

Thereupon the Government introduced in evidence the first minute book of Clarence Saunders Stores, Inc., showing minutes from organization to December 10, 1929, marked Government's Exhibits 23 to 33, inclusive, which abstracted to the issue are as follows:

EXHIBIT 23:

Articles of Incorporation of Clarence Saunders Stores, Inc., heretofore described in Exhibit 1.

EXHIBIT 24:

Minutes of first meeting of Incorporators of above company, held in Nogales, Arizona, on November 28, 1928; A. E. Sanders and E. B. Horne, the incorporators, being present. Shows subscription list 1 share each to A. E. Sanders, E. B. Horne and Lelia Sanders.

EXHIBIT 25:

Minutes of first meeting of Directors of above company. The following directors present in person: A. E. Sanders, E. B. Horne and Lelia Sanders. A. E. Sanders elected President and Treasurer; E. B. Horne Vice-President and Secretary. By-laws attached. An offer of A. E. Sanders to sell license and franchise of Clarence Saunders Corporation to this company and to assign agreement with Cashway Markets, Inc., in consideration of 151,000 shares of the common stock. Resolution accepting offer and authorizing application to Arizona Corporation

(Testimony of J. M. Nixon.)
Commission for sale of 1,500 shares of preferred stock at $100.00 per share, and 50,000 shares of common stock at $1.00 per share, with a commission or brokerage of 20%. Attached to these minutes is contract for license to operate "Clarence Saunders, Sole Owners of My Name" food stores, heretofore described in Government's Exhibit 14.

EXHIBIT 26:

Written signed offer of A. E. Sanders relating to the 151,000 shares of common stock heretofore described.

EXHIBIT 27:

Minutes of special meeting of Stockholders of the [176] corporation, held at Nogales, Arizona, January 1, 1929, authorizing amendment to Articles of Incorporation changing the name of the corporation to Arizona Clarence Saunders Stores, Inc. All the stockholders present, to-wit, A. E. Sanders, E. B. Horne and Lelia Sanders.

EXHIBIT 28:

Special meeting of Board of Directors of the corporation, held at Tucson, Arizona, January 22, 1929. Directors A. E. Sanders, E. B. Horne and Lelia Sanders present. Secretary's salary fixed at $200.00 per month, and President's salary at $1.00 per month. President authorized to enter into contract with Greenbaum Brothers for the sale of

(Testimony of J. M. Nixon.)

stock and to allow commission of 20%; President to transact certain business of the company without any special meeting of the Board of Directors. Powers rather broad.

EXHIBIT 29:

Minutes of meeting of the Board of Directors, held at Tucson, Arizona, March 16, 1929. Present: A. E. Sanders, E. B. Horne and Lelia Sanders. Resolution passed authorizing issuance of 35,000 shares of common stock to A. E. Sanders for services performed; President instructed to make application to the Arizona Corporation Commission to sell 80,000 shares of common stock at $5.00 per share and 10,000 shares of preferred stock at $100.00 per share.

EXHIBIT 30:

Minutes of special meeting of the Board of Directors, held at Tucson, Arizona, June 29, 1929. Directors present: A. E. Sanders, E. B. Horne and Lelia Sanders. Motion made and carried authorizing treasurer to pay a semi-annual dividend on all preferred stock of record as of April 30, 1929, payable up to May 31, 1929, on a basis of 8% per annum, and also authorizing treasurer to pay interest at the rate of 8% per annum on all partial payments made on subscriptions for stock in the period covered by the preferred stock dividend. Another motion made and carried authorizing and directing

(Testimony of J. M. Nixon.)

the President to make application to the Arizona Corporation Commission for a permit to sell 70,000 shares of the common stock of Arizona Clarence Saunders Stores, Inc., at $7.50 per share, and 11,000 shares of preferred stock at $100.00 per share. The President was also instructed to enter into a contract with Greenbaum Brothers for the sale of this stock, allowing commission. The Treasurer was authorized to issue an option to Greenbaum Brothers, of Phoenix, Arizona, for 40,000 shares of common stock of Arizona Clarence Saunders Stores, Inc. at $5.00 per share, the option to expire October 3, 1929. [177]

EXHIBIT 31:

Minutes of special meeting of the Board of Directors, held at Tucson, Arizona, June 29, 1929 Directors present: A. E. Sanders, E. B. Horne and Lelia Sanders. Fixed salary of A. E. Sanders, President, as $1,000.00 per month, effective June 1, 1929. Passed resolution authorizing A. E. Sanders, as President, to make arrangements with Greenbaum Brothers, of Phoenix, for the purchase of Piggly-Wiggly Southwestern Co.'s preferred and common stock, allowing Greenbaum Brothers a commission of 10%, the Piggly-Wiggly Southwestern stock to be taken on the basis of $100.00 for preferred and $10.00 for common. The Treasurer was authorized and directed to hold any of the Piggly-Wiggly Southwestern stock acquired in the account of "Stocks and Bonds on Hand".

(Testimony of J. M. Nixon.)

EXHIBIT 32:

Minutes of special meeting of the Board of Directors, held at Phoenix, Arizona, October 21, 1929. This meeting related to authorizing various persons to withdraw funds from various banks in which the company had money, upon countersignature, with the exception of A. E. Sanders, where no countersignature was necessary. The Greenbaum defendants are not mentioned in these minutes.

EXHIBIT 33:

Minutes of special meeting of the Board of Directors, held at Phoenix, Arizona, December 10, 1929. Directors Present: A. E. Sanders, E. B. Horne and Lelia Sanders. Resolution authorizing name of the corporation to be changed to United Clarence Saunders Stores, Inc., and changing the capital stock set-up to 50,000 shares of preferred at $100.00 per share, and 500,000 shares of common without par value. Resolution authorizing and directing the Treasurer to pay 8% per annum on all preferred stock issued and outstanding as of December 31, 1929, and 8% interest on the amount actually paid in on subscriptions to preferred stock of the corporation, provided that the subscribers are not in arrears in their payments.

Thereupon the Government introduced in evidence minute book of United Clarence Saunders Stores, Inc., showing minutes beginning January 21, 1930, to and including November 1, 1930, marked

(Testimony of J. M. Nixon.)
Government's Exhibit 22, which abstracted to the issue, is as follows: [178]

Minute Book of United Clarence Saunders Stores, Inc., showing the following minutes material to the issues in this case:

January 21, 1930: Special annual meeting of Stockholders, held at Phoenix, Arizona. Authorized the amendment of Articles II, V and XII, changing the name of the company to United Clarence Saunders Stores, Inc.; authorizing 50,000 shares of preferred stock at $100.00 and 500,000 shares of common stock without par value; increasing amount of indebtedness that company may subject itself to to $3,300,000.00; attached to minutes is financial statement of December 31, 1929, heretofore set out; electing A. E. Sanders, L. E. Sanders and J. M. Nixon directors.

January 21, 1930: Special meeting of Board of Directors. Present: A. E. Sanders, L. E. Sanders and J. M. Nixon; authorizing company to purchase one-half of the capital stock of a Kansas corporation known as "The United Clarence Saunders Stores Company" with its principal place of business at Topeka, Kansas, and to guarantee the payment of interest and principal of any debentures issued by the Kansas corporation up to the amount of $1,000,000.00, the guarantee to be effective only at such time as the Kansas corporation shall have acquired assets of $500,000.00.

(Testimony of J. M. Nixon.)

May 16, 1930: Special meeting of Directors. Present: A. E. Sanders, L. E. Sanders and J. M. Nixon. Resolution authorizing process to be served on the Secretary of State of Kansas in the event suit is brought upon the Arizona corporation in Kansas.

June 24, 1930: Special meeting of Directors. Present: A. E. Sanders, L. E. Sanders and J. M. Nixon. L. E. Sanders resigned as director and vice-president, and K. C. Van Atta was appointed to succeed her. J. M. Nixon resigned as secretary-treasurer, and as a member of the Board, and G. C. Partee was appointed to succeed him. Tom H. Brandt was appointed Treasurer; salary of President fixed at $1,500.00 per month, effective January 1, 1930, and provided that President shall act as General Manager of all Clarence Saunders Stores in Arizona. Resolution adopted that the President and Secretary apply to the Arizona Corporation Commission for a permit to sell $20,000 8% Debentures, and 1,000 shares of common stock at $10.00 per share, and to pay 20% commission for such sale.

August 7, 1930: Special meeting of the Board of Directors. Directors present: A. E. Sanders, K. C. Van Atta and G. C. Partee. Financial statement of the company as of June 30, 1930, was presented by the President. The minutes state that it was prepared by G. C. Partee and approved by

(Testimony of J. M. Nixon.)

Tom H. Brandt. It was approved by the Board of Directors and a copy ordered spread on the minute book. A [179] resolution was passed removing Tom H. Brandt as Treasurer, and appointing G. C. Partee in his place. The financial statement above mentioned, appearing on pages 26 and 27 of Exhibit 22, shows:

Current Assets—show cash on hand and in banks	$ 45,334.37
Accounts Receivable	124,101.17
Merchandise Inventories—at cost	276,836.59
	$446,272.13
Investments and Securities	109,801.91
Fixed Property Investments	166,351.41
Prepaid Operating Expenses	16,818.08
Other Assets	520,887.98
	$1,260,135.50
Current Liabilities	$ 126,965.56
Fixed Liabilities (8%) Debentures	54,100.00
Reserves	1,867.34
Capital Stock issued and outstanding—preferred	690,400.00
Common—No par	10.00
Subscribed and unissued—preferred	201.400.00
Common—unissued	---
Surplus	185,392.60
	$1,260,135.50

(Testimony of J. M. Nixon.)

This financial statement has the following typewritten certificate at the bottom:

> "I hereby certify that I have examined the books and records of United Clarence Saunders Stores, Inc. as of June 30, 1930; that the foregoing balance sheet is in agreement therewith, and that, in my opinion said balance sheet correctly reflects the financial position of the company as of that date."
>
> (Signed) JOHN W. WAGNER,
> Certified Public Accountant.

September 29, 1930. Special meeting of Board of Directors, held at Phoenix, Arizona. Directors present: A. E. Sanders, K. C. Van Atta and G. C. Partee. This meeting authorized the change in the name of the company to United Sanders Stores, Inc." and ordered the calling of a meeting of the stockholders for that purpose.

October 13, 1930: Special meeting of the Board of Directors, held at Phoenix, Arizona. Directors present: A. E. Sanders, K. C. Van Atta and G. C. Partee. A. E. Sanders resigned as President and H. D. Sanders was appointed to fill his unexpired [180] term. A. E. Sanders appointed General Manager of the company at $250.00 per month.

November 1, 1930: Special meeting of Stockholders, held at Phoenix, Arizona. H. D. Sanders, President, presided; G. C. Partee acted as Secre-

(Testimony of J. M. Nixon.)

tary. 154,201 shares of common stock represented, out of a total of 230,061 outstanding. Authorized change of name to "United Sanders Stores, Inc."

Whereupon

TOM H. BRANDT,

called as a witness on behalf of the Government:

Thereupon certain books and records of the United Clarence Saunders Stores, Inc. were marked for identification as Government's Exhibits 34 to 39, inclusive.

My name is Tom H. Brandt, and I reside at Tombstone, Arizona. During the latter part of 1929 and the first half of 1930 I was employed by the Stores Company, first as ledger man, and then became comptroller, which I handled until August 1930. I started with the Stores Company about September 15, 1929, and remained with them until August of 1930. I was Treasurer for about three or four days. During my connection with these companies my duties were the usual duties of a comptroller, that is, to maintain the records of accounts, plan the accounts, the information that flows into them, render statements of the financial condition of the company, and analyze the causes of either failure or success of the business. I was familiar with all of the books, records and accounts of the company. I have examined, at your request,

(Testimony of Tom H. Brandt.)

the books which have been marked for identification as Government's Exhibits 34 to 39, inclusive. Those are the books and records of the Clarence Saunders Stores, Inc., and its successors in name. Part of those records were kept by me or under by direction. I have examined the entries in those books which were made by other parties than myself and I am familiar with the handwriting. The entries were made by parties employed by the Stores Company. [181]

CROSS EXAMINATION

I have examined these books and will say that they are not all of the records of the Clarence Saunders corporation. You have further subsidiary information that blends into these, these are missing, but I couldn't give you the complete list. "These are all of the books, you have all the subsidiary information. I have examined the books and will say that the accounts of the company that eventually blend into the general ledger are missing—that is to say, the records that help to make up this book, such as checks, vouchers and bills rendered. They are not here. Neither is the payroll and the detailed information that is accumulated through your journal and cash records, such as substantiates these records. These records are not here. The journal records, all journalization or forms of journalization are here. The accounts receivable ledger is not here. We have two phases of accounting—

(Testimony of Tom H. Brandt.)

commercial accounting, pertaining to the sale of groceries, and that of financial department, pertaining to the sale of stock. The subscription ledgers and the accounts receivable pertaining to the financial department are not here. The monthly trial balances which were taken, are not here. I made or supervised the making of these trial balances from September 1929 to August 1930, and one was made each month. I have testified that the stock books and accounts receivable are not here. You have one journal for the sale of it. The detailed and subsidiary information is not here. The subscriptions receivable are not here. The stock transfer stubs are not here either. I am not a certified public accountant. Insofar as the entries in these books which I have identified are concerned, I would say that they are true and correct insofar as my supervision extended. The books were not in balance when I went there; we went back and audited them and [182] balanced them.

"Q In so far as the original entries are concerned prior to your employment, you cannot say whether the books are correct or not?

A Through an audit, yes.

Q Will you kindly listen to my question? I said as to the original entries made in the books of the corporation, you cannot say whether they were true or not, prior to your employment anyhow?

A No."

(Testimony of Tom H. Brandt.)

After I left the employ of the company in August, 1930, I could not say whether the entries are true and correct or not. The original entries made in the cash and disbursement records were taken from the vouchers, and they are not here. The original entries made from the cash receipt records are not here. Exhibit 36 for identification, called a record of cash receipts from September 1, 1930, to October 30, 1930, was a record made after my time and I cannot identify it in any way, and I don't know whether or not it is a true and correct record of the transactions it purports to set forth. The original sources from the journal, that is to say, subsidiary records, are only here in part. In so far as my time, the entries made in Exhibit 37 for identification, the journal, are true and correct. Referring to Government's Exhibit 38 for identification, which is a record of stock sales and subscription records, this was made up from a report that came from the financial department daily, and the original records of the transaction are not here. The detail showing the actual sales of the debentures and the subscriptions were made in writing, but are not in court. The entries made in Exhibit 39 for identification, comes in through your journalization of your cash books, your regular journal. [183] The source from which the general ledger entries are made are in turn your journal entries. I say the intermediate source because it reverts back to all the detail we spoke about before, substantiat-

(Testimony of Tom H. Brandt.)

ing the journal entries which are not here, but the posting medium which makes up your general ledger, are here. As to entries made in the general ledger, prior to September 15, 1929, I can say the entries are true and correct in so far as the audit was made. I cannot say that prior to September 15, 1929, the entries are true and correct as they were not made under my supervision, nor could I say that the entries made in the general ledger from early August 1930, on, are true and correct.

"Q As to Exhibit 34 for identification, Record of Cash and Disbursements, as to Exhibit 35 for identification, The Cash Receipt Record, as to Exhibit 36 for identification, Record of Cash Receipts from September 1st, 1930, to October 1st, 1930, as to Exhibit 38, Record of Stock Sales and Subscription Agreements, as to Exhibit 39 for identification, the General Ledger of the Company, entries in each and every one of those four identifications are not entries, original entries evidencing a transaction, the original evidences of the transaction made at the time the transaction takes place, are they?

A No, those records are only sources of original entry."

RE-DIRECT EXAMINATION

"Mr. FLYNN: Q Referring to the Government's Exhibit 36 for identification, which you

(Testimony of Tom H. Brandt.)

stated on cross examination was kept after you had severed your connection with the company, in whose handwriting are those entries made? [184]

Mr. REIN: We object to the question on the ground it doesn't make any difference whose handwriting it is unless the witness is able to substantiate the entry. I might say I know whose handwriting is in that book, but I know nothing about the entry.

The COURT: Objection overruled.

Mr REIN: Exception.

A September 2nd, the first entry is in the handwriting of Freida Braun.

Mr. FLYNN: Q Was she an employee of Sanders Company?

A She was."

During the time I was connected with the company they were operating stores in different parts of Arizona. The information received from these stores daily were compiled from their cash register sales, which was brought to the general office on a form that entered into the regular accounting. The operating expense accounts of each store, in all its phases, was maintained in the general office.

"Q Now I will ask you if these books which have been marked for identification, if they contain all of the records of this company or the successors necessary to determine the operating

(Testimony of Tom H. Brandt.)

expenses, administrative expenses, and the net profit and loss of the company?

A That can be obtained from the general ledger."

When I quit the company in August 1930, G. C. Partee took my place. He had been employed there also during my time, doing general ledger work and general bookkeeping under my direction.

"Q During the time of your employment there, were these records which are marked here as Government's Exhibits 34 to 39, inclusive, kept [185] in the regular order of business?"

This was duly objected to by counsel for the Greenbaum defendants on the ground that it was not the proper way to lay the foundation for the introduction of books and records. The objection was overruled by the court, to which ruling the Greenbaum defendants duly excepted.

The witness resumed: I would think Government's Exhibits 34 to 39, inclusive, were kept in the regular order of business.

RE-CROSS EXAMINATION

The records of the sales made by the various stores were not originally kept in the general office. They came in through the stores. The original entries of the receipts of the business and the stores were made in the stores themselves and collected daily.

Whereupon,

G. C. PARTEE,

called as a witness on behalf of the Government, testified:

I reside in Carson City, Nevada. I was first employed by the Stores Company in January 1929. At first I was employed as bookkeeper, later as an auditor, and later as Secretary-Treasurer. At the time Mr. Brandt left the employ of the company, in August 1930, I was auditor. At the time he left I assumed charge of the accounting in the office. During all of the time I was with the company I was connected with the bookkeeping department in some way or other and I am familiar with the different sets of books kept by the company and the manner in which they were kept. I haven't seen the books since I came to town this time but will now examine them. The entries made in Government's Exhibits 34 to 39 for identi- [186] fication, following Mr. Brandt's severance from the company, were either made by me or under my supervision and direction, with the exception of a period after the U-Save Holding Corporation took all the books to Los Angeles, and excepting the detailed records. After that I had no jurisdiction over them whatsoever. That was about October 1930. I see that the general journal entries for the month of October and November were not made by me. I was connected with the company at the time of the receivership.

(Testimony of G. C. Partee.)

"Q During the time that you were connected with the company, I will ask you if these books which I have referred to here as marked for identification, were kept in the regular course of business of the company?

A Yes."

Above question duly objected to by counsel for the defendants upon the ground that it is not a proper question to lay the foundation for the introduction of these books, which objection was overruled by the Court, to which ruling the defendants by their counsel then and there duly excepted.

CROSS EXAMINATION

These are not all the books that were kept by the company. This was a rather large concern and there are a lot of detail books. I could not recall all of them, but the stock ledgers are not here. The transfer record is not here. The stock ledgers on which was recorded the name of the stockholder and the amount of stock, is not here. The stock certificate books are not here. The stock journals appear to be here up to February 1930. The stock subscription journal prior to January 1929 and subsequent to March 1930 is not here. There are other books that are not here, such as the accounts [187] receivable and the accounts payable, and the detail record of the operation of the various stores, and things like that. I would call the operation of

(Testimony of G. C. Partee.)

the Stores operating accounts, used as detail information and then at the end of the periods transferred to the general books, which are here. No inventories are available here. The monthly statements are not here. These statements were compiled from the detailed operating records which I mentioned a while ago. The detailed operating records were kept in permanent form, I would say. Of course the statements, work sheets and things like that were not. Monthly trial balances were made throughout the time I was with the company and up to the time the books were taken to Los Angeles. None of those are here, nor are they in these books I have just examined. There were several operating books in which the operating accounts were kept, which I could not name at the present time, but they are not here. The entries made in these books over in California were not made under my supervision or direction and I don't know as to the truth or accuracy of those entries, or whether they fairly depict the transactions they purport to depict, and cannot vouch for them.

RE-DIRECT EXAMINATION

I believe I prepared one annual report for the Arizona Corporation Commission. Tom Brandt had prepared the reports up to the time his connection with the company was severed. While I was connected with the company statements were prepared as to the financial condition of the company and

(Testimony of G. C. Partee.)

sent through the mail to stockholders. These statements are what you call balance sheets. The information that went to make up the annual reports for the Corporation Commission contain certain operating information which is not in these records I have just examined, being Government's Exhibits 34 to 39 for identification. I could get the total profit or loss from the general ledger, [188] but as for the details, there is not sufficient information in these records to make up a detailed statement of profit and loss. Government's Exhibit 10, the statement of May 31, 1930, was made while I was with the company, either as bookkeeper or auditor, but before I had any official connection with the company. It was signed, and was probably prepared, by a Mr. Mason.

Whereupon

TOM H. BRANDT,

recalled as a witness on behalf of the Government testified:

During the time that I was connected with the company A. E. Sanders was also connected with the company in the capacity of President and General Manager. The books were kept in the office of the company on South Second Avenue, down at the warehouse, where Mr. Sanders also had an office. We made up a daily sales and a daily cash report,

(Testimony of Tom H. Brandt.)

and at the end of each month the operating balance sheets were made up, and were all submitted to Mr. Sanders. From time to time he wanted information about the books and he either came out to see them or, at his request, they were taken in to him. Statements were taken from those books showing the profit and loss and financial standing of the company, which were submitted to Mr. Sanders. Those statements were based upon the records which I have identified here and which have been marked Government's Exhibits 34 to 39 for identification. These last numbered exhibits for identification contain all the records, figures and information necessary to determine the operating expenses, administrative expenses, and the profit and loss of the business.

I am acquainted with the defendants Gus, Charles and William Greenbaum. During the time I was connected with the [189] company the necessary information that pertained to the financial department emanated from the offices of the Greenbaums. They made daily reports or statements of stock sales and monies collected by them, which were submitted for us to enter into our own records. We had that detailed contact, usually every day, with one or the other of the Greenbaum representatives. In the Fall of 1929, November or December, I discussed and submitted a monthly operating report and statement to Mr. Sanders down at the ware-

(Testimony of Tom H. Brandt.)

house, and there were occasions when Gus Greenbaum was present. At approximately the time I fixed, Gus Greenbaum and A. E. Sanders were present when there was a discussion as to the profit and loss of the company. One general profit and loss statement showing the general financial condition of the company was submitted for their information. The discussion of those particular statements was whether or not the accounting was entirely correct as to the true profit and loss of the stores operating.

I am familiar with the statement prepared from the books of the company and issued as of December 31, 1929. The instruments which you have shown me, marked Government's Exhibit 40 for identification, constitutes a statement taken from the books of the company and is the form in which we showed our financial statements. This statement was taken from the work sheets as made up from the books, and then a number of copies were mimeographed as being certified to and afterwards were shown to the trade to show our financial condition and to enhance our credit standing. A number of copies of that statement were given to Mr. Gus Greenbaum. Mr. Sanders did not prepare the statements but they were submitted to him for his approval, and upon the original being approved, I had copies made. I had about one hundred copies made. [190]

(Testimony of Tom H. Brandt.)

"Q At any time did Mr. Sanders examine the books of the company?

A Yes, sir"

Mr. Sanders at times made a personal examination of part of the books. He would come to the desk and look through the accounts receivable, and thumb through them and ask questions pertaining to this account and that account. I couldn't say he examined all the books, but in the interest of the records he came out and asked for information, and actually viewed the books and handled them with his own hands. He did this only occasionally. It was the general custom of the office there that these books were kept under Mr. Sanders' direction.

CROSS EXAMINATION.

I was comptroller of the company and the actual bookkeeping department was under my supervision, though the policy was set by Mr. Sanders. The books were kept at the warehouse in a safe and I had the combination to the safe, and I don't think Mr. Sanders ever opened that safe. Mr. Sanders' interest in the bookkeeping department was that the work be done as economically and efficiently as possible. He always worked in the interest of economy and efficiency. Government's Exhibit 40 for identification was actually prepared by me.

RE-DIRECT EXAMINATION.

When I first became connected with the Stores Company I was taken by Bob Bobbitt to Gus

(Testimony of Tom H. Brandt.)

Greenbaum, and also talked to Mr. Mason, who was then comptroller of the company. I did not have much conversation with Gus Greenbaum about any employment. Most of the conversation was between Mr. Bobbitt and Gus Greenbaum. Mr. Bobbitt had known of my work before and he recommended me as a capable man to handle the bookkeeping [191] system for the Clarence Saunders Stores. This conversation took place in the Greenbaums' office in the Security Building. At that time they were known as Greenbaum Brothers, and afterwards formed the Bond and Mortgage Corporation. The financial office of the Saunders Stores Company was in the Security Building and at that time was operated by Greenbaum Brothers. The Stores Company was in an entirely different building down on South Second Avenue. Greenbaum Brothers handled the sale of stock and securities of the Clarence Saunders Stores, Inc.

I am familiar with the literature that was used in connection with the sales of the securities of the Stores Company, and will say that it was handled in the financial department in the Security Building by the Greenbaum Brothers.

We had a rubber stamp of A. E. Sanders' name, which was placed on some of the circular letters sent out. It was kept at the Stores Company office at South Second Avenue and at the request of Mrs. Loveland, Office Manager, it was taken up to the Security Building. I took it up once myself,

(Testimony of Tom H. Brandt.)

and one of the clerks took it up once. We have at times taken up to the Greenbaums' office in the Security Building letterheads and envelopes for circularization use from our stationery stock at the warehouse. I have seen those circulars or letters after they had been typed or printed and after they had been signed with the rubber stamp, being the facsimile signature of A. E. Sanders. Mrs. Loveland was not employed by the Stores Company that I know of. Her work entailed a remittance advice daily of collections and subscriptions made in the sale of stock, and in the clearing of that detail it was necessary that that remittance come to the Clarence Saunders Company, and that was consummated through a form that showed the daily subscriptions. It was a detailed [192] contact with the office of the clerk there and the office of the clerk at the Stores Company.

Whereupon

GEORGE J. EARHARDT,

called as a witness on behalf of the Government, testified:

I was employed by the receiver of the United Sanders Stores, Inc. by Mr. Woods, the auditor for the receiver. That was at the time the receivership started. I had occasion to see some of the books of the United Sanders Stores, Inc. that were turned

(Testimony of George J. Earhardt.)

over to the receiver. Examining Government's exhibits 34 to 39 for identification, I examined all but the top two.

CROSS EXAMINATION.

These are not all the books which I saw in the office of the receiver. There were quite a few other records, such as sales records, stock books, stock, ledgers, inventories, balance sheets, and monthly statements. These I did not come in contact with nor do I know what became of them. They were in storage at the Chambers Warehouse, in Phoenix. I think the original vouchers or the original entries, from which were taken the entries that now appear in Government's Exhibits 34 to 39 for identification, are still over in California. At any rate they never came into my hands. The operating accounts are not here in court, neither are the bound volumes of the monthly statements, nor the inventories. I am not familiar with the books of account before they were turned over to me, and cannot say that Government's Exhibits 34 to 39 for identification are in the same condition as they were at the time they were delivered to the first or second receiver, or to me. [193]

Whereupon

TOM H. BRANDT,

recalled as a witness on behalf of the Government, testified:

(Testimony of Tom H. Brandt.)

I am familiar with the signature of Mrs. Loveland, A. E. Sanders and Gus Greenbaum. The first letter of Government's Exhibit 41 for identification is signed by Mrs. Loveland. The second letter by A. E. Sanders. The third letter is not signed by A. E. Sanders personally, nor by the rubber stamp facsimile of his signature. I don't know who signed that third letter. Referring to the fourth letter of this Exhibit for identification, it is not signed by Mr. Sanders, and I cannot tell who signed it. The next letter of this group, dated October 2, 1929, is signed by E. B. Horne. The letter dated October 11, 1929, is signed by Mrs. Loveland. The next letter, dated November 26, 1929, is signed with the rubber stamp signature of A. E. Sanders. The stationery on which this letter of November 26, 1929, is written is some of the stationery which was supplied by the Stores Company to Greenbaum Brothers and Bond and Mortgage Corporation. The letter dated December 18, 1929, is signed with the rubber stamp facfacsimile of A. E. Sanders' signature. The letter of April 3, 1930, is also signed with the rubber stamp facsimile of A. E. Sanders' signature. The letter of July 1, 1930, is signed with the rubber stamp facsimile of A. E. Sanders' signature. I am familiar with Mr. K. C. Van Atta's signature. The letter of July 21, 1930, bears his signature. He was an employee of the Stores Company. The letter dated December 29, 1930, which is attached to a notice of

(Testimony of Tom H. Brandt.)

special meeting of stockholders, is signed by G. C. Partee, an employee of the Stores Company. The mimeographed statement dated January 15, 1931, is signed by G. C. Partee. The letter of December 1, 1929, was signed by me. I dictated the letter and it was mailed out. I have seen letters similar to [194] the letter dated October 11, 1929, which is a multigraphed circular letter, in the office at the warehouse. They were prepared by Greenbaum Brothers. Some of them came back to the office of the warehouse of the Stores Company through the mails with allotment certificates attached. I know these letters were sent through the mail because the letter pertains to allotment certificates which were sent to all purchasers of stock, and in re-mailing these allotment certificates many of them did not go back to the Greenbaum office but came to the Stores Company and were taken back to Greenbaum Brothers:—that is how I know that allotment certificates were received through the mail. Referring to a letter dated December 31, 1929, which has attached to it another letter or notice of the same date, I have seen this letter in the office of the Stores Company on South Second Avenue. It was prepared by me and multigraphed copies were made by O'Neil & Company. They were placed in the mail by one of the clerks in the Stores office. I don't know the name of the clerk. The letters were prepared by me, and the clerk, on instructions, after they were stamped and sealed,

(Testimony of Tom H. Brandt.)

placed them in the post office. Referring to the letter of December 21, 1929, I have seen that letter in the office of the Stores Company. It was placed in the mail by one of the clerks, under my direction. The clerk mailing the letter was an employee of the Stores Company.

(At this juncture the Court instructed the Clerk to take Government's Exhibit 41 for identification and mark each letter 41-A, 41-B, etc.)

The witness resumed: The first letter dated January 12, 1929, was signed by G. B. Greenbaum, one of the defendants here. [195]

CROSS EXAMINATION.

(The cross examination of this witness related to identifying the letter of December 31, 1929, and the letter of December 21, 1929, and is unimportant and immaterial)

RE-DIRECT EXAMINATION.

I dictated and signed the letter of December 21, 1929. Mr. A. E. Sanders directed the policy of the company, including the ordinary details or correspondence of the company. It is hard to explain the policy of the company in sending out mail. If it is mere detail you go ahead and do it yourself without going to Mr. Sanders. Concerning this particular letter, it was not necessary to go to him so I signed it myself.

Whereupon

MARGARET ROMLEY,

called as a witness on behalf of the Government, testified:

I was employed by the Greenbaums in March of 1929 for a period of about seven or eight months. The arrangements for my employment were made with Mr. Gus Greenbaum, and I worked in their office in the Security Building mailing our circulars and form letters. Employed in the office besides myself were Mrs. Loveland, Miss Fitts, Mrs. Galland and Mrs. Bellas. Mrs. Loveland was bookkeeper and stenographer. The general custom in regard to handling letters and circulars was to go through the files and get the names, and we addressed the envelopes for the circulars, folded them, and sent them out. This was done under the direction of Mr. Gus Greenbaum. We had two or three different form letters that were sent out. Mr. Gus Greenbaum and Mrs. Loveland's signatures were on some of them. Referring to Government's Exhibit 41-L for identification, being the letter dated July 1, 1930, it was signed [196] with the facsimile signature of A. E. Sanders made with a rubber stamp. I placed some of the letters that were sent out in the mail, by either taking them to the Post Office or putting them down the mail chute in the Security Building.

(Testimony of Margaret Romley.)

CROSS EXAMINATION.

I have no recollection of just what or when any particular form of these circulars went out. The rubber stamp that I speak of was kept in plain view on one of the desks in the office.

Whereupon

MRS. ADDIE DRISCOLL,

called as a witness on behalf of the Government, testified:

I reside at 1351 Fourteenth Street, Douglas, Arizona, and resided there during the years 1929, '30 and '31. Referring to Government's Exhibit 41-U for identification, consisting of a letter and envelope, I will say that I have seen it before at the Douglas Post Office when I took it out of the mail. I received this letter through the United States Mails. I am pretty sure that it was enclosed in that envelope, but wouldn't swear it is the same envelope. I turned the letter and envelope over to Post Office Inspector Means. The letter was in this envelope, or one identical with it as far as the address and letter head is concerned, when I received it.

"Mr. FLYNN: We offer in evidence Government's Exhibit 41-U for identification.

* * *

Mr. HOWE: We object to the Government's

(Testimony of Mrs. Addie Driscoll.)

offer in evidence upon the ground and for the reason that it does not connect nor tend to connect the defendants Greenbaum or any one of them with the offense [197] charged and shows on its face that said defendants were not a party either to the mailing of the letter or the letter which elicited that response, incompetent, irrelevant and immaterial as far as the defendants Greenbaum or any one of them are concerned.

Mr. REIN: May I add the further suggestion there is no adequate proof of mailing by the defendants Greenbaum.

The COURT: Objections overruled.

Mr. REIN: Exception."

The document was received in evidence as Government's Exhibit 43, and is the identical letter set forth in the first count of the indictment, and reads as follows:

"Bond and Mortgage Corporation
Security Building
Phoenix, Ariz.

April 9, 1930.

Addie Driscoll,
Box 103,
Douglas, Arizona.

Dear Madam:

Answering your letter of April 8th, we wish to advise that the Common stock of the United

(Testimony of Mrs. Addie Driscoll.)

Clarence Saunders Stores, Inc., is being offered to the public through this company for $10.00 per share.

Trusting that this is the information you desire, we are,

Yours very truly,

BOND AND MORTGAGE CORPORATION,
By: (Signed) M. LOVELAND,
Assistant Secretary." [198]

The witness resumed: I received Government's Exhibit 41-A for identification through the mails at Douglas, Arizona. It was enclosed in a stamped envelope addressed to me. The document was received in evidence as Government's Exhibit 44, which abstracted to the issue is as follows:

"Letter from Arizona Clarence Saunders Stores, Inc., dated June 18, 1929, signed by M. Loveland, Secretary to Manager, acknowledging the receipt of subscription to stock.

(The witness gave the same testimony as to Government's Exhibits 41-B, 41-E, 41-F, 41-G, 41-H, 41-I, 41-J, 41-K, 41-L, 41-M, 41-N and 41-T for identification, which were received in evidence, with the exception of 41-I and 41-J, and which abstracted to the issue are as follows:

(Testimony of Mrs. Addie Driscoll.)

EXHIBIT 45.

(41-B for identification):

Letter from Arizona Clarence Saunders Stores, Inc., dated July 16, 1929, signed by A. E. Sanders, President, enclosing stock certificates and stating "You will find that your investment in Clarence Saunders Stores will be one of the most profitable ever made", and "with Clarence Saunders' guiding hand over the different stores to be established under his name, you can only see one thing and that is, within a few years you will find Arizona Clarence Saunders Stores the outstanding food distribution stores in the world."

EXHIBIT 46.

(41-E for identification):

Letter from Arizona Clarence Saunders Stores, Inc., dated October 2, 1929, signed E. B. Horne, Secretary, being a form letter enclosing allotment right certificate allowing recipient to purchase common stock at $5.00 per share, the public quotation being $7.50 per share. Strong boosting letter dwelling on the great volume of business being done by the company, and urging that more stock be purchased under the allotment certificate, thereby saving $12.50 per unit; predicting a marked advance in the common stock in the near future.

(Testimony of Mrs. Addie Driscoll.)

EXHIBIT 47.

(41-F for identification):

Letter from Arizona Clarence Saunders Stores, Ind., dated October 11, 1929, signed by M. Loveland, Secretary to Manager, thanking the purchaser for taking advantage of allotment [199] certificate and stating that "In order that you may receive your dividend checks and other communications promptly, we ask that you kindly keep our treasurer advised of your correct address."

EXHIBIT 48.

(41-G for identification):

Form Letter of Arizona Clarence Saunders Stores, Inc., dated November 26, 1929, signed with rubber stamp facsimile of A. E. Sanders' name, cautioning stockholders to not trade stock "for nebulous issues of uncertain values" even if listed on the New York Stock Exchange; and cautioning stockholders not to buy stock on margin, and stating that "through your preferred stock you are receiving 8% a year on your investment from the proceeds of the stores and warehouses." "I believe that your common stock will eventually surprise you by the large annual income per share you will receive from it over a long period of years." This letter also stated that the Arizona Stores are already establishing records and that they had put in an order for 32,000 cases of Del Monte products,

(Testimony of Mrs. Addie Driscoll.)

worth approximately $220,000.00, and had placed another order with the Duncan Coffee Company of Houston, Texas, for over 4,000 pounds of "Sole Owner—Finest Coffee", which the letter states was a world record order, and that "Your stores in Arizona are doing an enormous business. Do not gamble away your interest in them". The letter further calls attention to the very large rate on the investment "considering the wide margin of safety which protects your investment

EXHIBIT 49.

(41-H for identification):

Form Letter of Arizona Clarence Saunders Stores, Inc., dated December 9, 1929, signed by rubber stamp facsimile of A. E. Sanders' signature, states in effect that in view of the fact that the retail business has reached such large proportions that the company's entire attention should be confined to merchandising activities and that the financial department will be discontinued after this date. It further states that the Bond and Mortgage Corporation, Suite 701, Security Building, will hereafter handle the stock issues. States that the company expects to begin operation of the first group of stores in New Mexico during the early part of 1930, and recommends the purchase of additional stock from the Bond and Mortgage Corporation, where "you may be assured you will receive the same efficient and courteous service to

(Testimony of Mrs. Addie Driscoll.)

which you are accustomed from all persons in any way connected with your company." Notice of annual meeting of stockholders attached to this letter. [200]

EXHIBIT 50.

(41-K for identification):

Form Letter from United Clarence Saunders Stores, Inc., dated April 3, 1930, signed by rubber stamp facsimile of A. E. Sanders' signature, states in effect that Henry Ford advocates chain stores; that on April 12th our Prescott store will be opened and the company would then start to invade the northern territory; that some time during April a store at Glendale would be opened, and that "in the other towns of the State where stores are to be opened we hope to have them operating by the end of 1930. The volume of business at present has been very satisfactory, and we expect that this year will run into several millions of dollars." * * * "Recently the State Corporation Commission granted the United Saunders Stores, Inc., a permit increasing the price of the common stock to $10.00 per share, at which price we understand these shares are now offered by the brokers to the public."

EXHIBIT 51.

(41-L for identification):

Form Letter from United Clarence Saunders Stores, Inc., dated July 1, 1930, signed by rubber

(Testimony of Mrs. Addie Driscoll.)

stamp facsimile of A. E. Sanders' signature. States in effect that the volume of business of the stores company has steadily increased and that the stockholders personal interest in the company "has been the moving factor for the splendid showing that has been made." * * * "The writer has had the pleasure of just returning from Memphis, and judging from the volume of business done by other units throughout the country, Arizona is among the real leaders. We are trying to make the Arizona unit the largest in the country and the only way this can be accomplished is through your cooperation. Boost your company wherever possible" etc.

EXHIBIT 52.
(41-M for identification):

Form Letter from United Clarence Saunders Stores, Inc., dated July 21, 1930, signed by K. C. Van Atta, Vice-President. States in effect that since January 26, 1929, when the first store was opened 18 additional stores have been opened, making a total of 19 in Arizona, and that they expect to have a great many stores scattered over the State where they can be profitably operated. "Our volume of business is beyond any figure that we had anticipated, with each month showing a substantial increase. You, no doubt, are aware that Clarence Saunders Stores in Arizona are home owned, home operated, and operated by Arizona capital." [201]

(Testimony of Mrs. Addie Driscoll.)

EXHIBIT 53.

(41-N for identification):

A mimeographed copy of letter to stockholders of United Clarence Saunders Stores, Inc., dated September 29, 1930, mimeographed signature of A. E. Sanders, President, calling attention to stockholders meeting to be held November 1, 1930, for the purpose of changing the name to United Sanders Stores, Inc. Also states that under the present franchise agreement with Clarence Saunders they have to pay him 1/2 of 1% of the gross volume of business, which amounts to about $10,000.00 a year, and that under the new plan they will be able to increase their volume of business and save the stockholders this immense royalty by doing away with the Clarence Saunders franchise agreement. Attached to letter is a notice of special meeting to stockholders and blank proxy.

EXHIBIT 59.

(41-T for identification):

Letter from Arizona Clarence Saunders Stores, Inc., dated December 21, 1929, signed by Tom H. Brandt, comptroller, which states "In reply to your letter of December 18th, we suggest that you get in touch with the Bond and Mortgage Corporation, 701 Security Building, as they are now handling our company's securities."

The defendants duly objected to receiving each of said exhibits in evidence as they were offered be-

(Testimony of Mrs. Addie Driscoll.)

cause they were hearsay and not binding upon the Greenbaum defendants, and for the further reason that there was no adequate proof of mailing, but the Court overruled each of said objections, to which rulings counsel for the defendants then and there duly excepted.

The witness resumed: I received the notice dated October 6, 1930, through the United States Post Office at Douglas, Arizona, contained in a stamped envelope, being Government's Exhibit 41-O for identification.

The notice was received in evidence as Government's Exhibit 54, which is as follows: [202]

"UNITED CLARENCE SAUNDERS STORES, INC.

305 South Second Avenue
Phoenix, Arizona

October 6, 1930.

NOTICE TO STOCKHOLDERS

No doubt you have received a notice of a special meeting called for the latter part of this month. This meeting is of utmost importance to every investing stockholder of the United Clarence Saunders Stores, Inc., and we would certainly like for every one that possibly can to attend this meeting. If not to send in their proxy but we prefer to see them in person.

The primary purpose for which this meeting is being called is to change the name of the company

(Testimony of Mrs. Addie Driscoll.)

from United Clarence Saunders Stores, Inc., to The United Sanders Stores, Inc., of Arizona and to further change the plans of the company in respect to operation and management of the additional stores it proposes to establish in this state.

Under the original plan you were identified with the Clarence Saunders Corporation under a franchise agreement. We are paying one-half of one per cent of our gross sales for this privilege, which amounts to approximately $10,000.00 a year at the present time. The officers of your company have felt for some time that it would be good business for the company to be able to operate as an independent corporate unit, entirely removed from any affiliations with the Clarence Saunders System.

Stores would be operated under the trade name of Sanders U-Save System and due to the unfavorable publicity which has been attached to Mr. Clarence Saunders' name in connection with recent business reverses, the name of Clarence Saunders might prove to be more of a liability than an asset to your company. Under the proposed change your company would function as a state unit of The Sanders Stores of America, the corporation to be formed and to control forty-two stores and five warehouses already established and doing business in Arizona and California, known as:

United Clarence Saunders Stores, Inc.,
Piggly-Wiggly Southwestern Company
Piggly-Wiggly Yuma Company
U-Save Holding Corporation

(Testimony of Mrs. Addie Driscoll.)

These stores and warehouses are now doing a volume of business of over $3,000,000.00 annually and have assets totaling approximately $2,800,-000.00.

At this meeting the above plan and change of operating the stores of this company will be discussed and ex- [203] plained in detail and action will be taken in respect to a change of such plans and the officers of the company authorized to enter into all necessary contracts carrying out such changed plans, if the same meets with the approval of the stockholders at this meeting. At the present time your company is planning its initial Sanders U-Save store in Tucson and the officers are exceedingly desirous of having all necessary preliminary arrangements in connection with any change of plans disposed of in advance of the time this store is opened in order that no delay will occur in establishing other stores in the state of Arizona. Control of the Arizona unit has passed to H. D. Sanders, who, in turn, will pass his control over to The Sanders Stores of America, the Holding Company to be formed.

H. D. SANDERS has had a very wonderful career in western merchandising, was a merchandise broker at El Paso, Texas, organized the Texas Produce Company at El Paso, Texas; was also connected with the American Wholesale Grocery Company at El Paso, Texas. Later he entered the

(Testimony of Mrs. Addie Driscoll.)

retail field, opening the Piggly-Wiggly at Nogales, Arizona; from there he branched out over into the Yuma and California territory, where he purchased the Piggly-Wiggly Imperial Company, which was absorbed into his U-Save Holding Corporation. The fixtures which he invented are considered the most logical form of retail merchandising and will save the company thousands of dollars by installing this same equipment in our present stores.

He is a merchandising genius which has seldom been equaled and we know that you could not find a better man to be in charge of this unit.

Associated with H. D. SANDERS will be K. C. VAN ATTA, born in New York City, his first business training with the Chase National Bank of that city; later connected with the Murray-Lane Wholesale Grocery Company, operating wholesale and retail groceries throughout New Mexico and eastern Arizona. For the past five years he was connected with the California Packing Corporation, packers of Del Monte food products, whom he left recently to become connected with this company.

A. M. KALER, buyer, has a record that is unequalled in the United States. He has spent the past 24 years directly connected with the food industry; 16 years with Armour and Company and in 1922 he joined the Piggly-Wiggly System, with headquarters in Los Angeles. He took an active part in building up this unit from 16 stores to

(Testimony of Mrs. Addie Driscoll.)
200 stores, located in Los Angeles, California and vicinity, Salt Lake City and Ogden, Utah, and Cleveland, Ohio. After leaving this wonderful successful unit, which was purchased by the Safeway Company, he joined the Sun Maid Raisin Growers of Fresno, California, and traveled extensively over the United States, contacting chain stores and [204] other large business. Both his extensive general experience, as well as the knowledge of advanced chain store methods will be of tremendous value to this company and you are indeed fortunate to secure such an outstanding authority as our Purchasing Agent and Merchandising Manager.

WARFIELD RYLEY, General Manager; Mr. Ryley is a true descendant from a family of grocerymen. His father before him was in the general mercantile business. Mr. Ryley was born in Kansas City, Missouri, 55 years ago, attended their city schools and both John Hopkins and Yale Universities. For a number of years he was connected with the Ridenour-Baker Company of Kansas City, Missouri, one of the largest wholesale grocers of the United States. He later entered the general merchandise broker business in Arizona. Mr. Ryley is considered not only a gentleman of the highest integrity but an outstanding merchandise genius.

CY MEASDAY, who will be Manager of the Tucson division, practically built up your Piggly-Wiggly stores in Tucson, and Phoenix. Graduated

(Testimony of Mrs. Addie Driscoll.)

from the University of Arizona. From a small capital invested in these stores he made a wonderful success and earned the stockholders and owners an enormous profit. Recently these stores were sold out to the McMarr Stores and through this consolidation you were fortunate to secure the wonderful service of Mr. Measday.

J. S. MACKIN: Mr. Mackin, who will be connected with this organization in the capacity of General Manager of Retail Stores, is a merchant with a long record of store management. He is eminently qualified to keep the Sanders U-Save Stores where they are—always one step ahead of the procession.

He was formerly manager of the Trinity Grocery Company, wholesale grocers at Dallas, Texas; Manager of the American Wholesale Grocery Company, El Paso, Texas; Manager of the Star Cash Grocery, Houston and Dallas, Texas,—a chain of 120 retail stores.

With his knowledge of merchandising methods and chain store management he is invaluable to this organization.

A. E. SANDERS will still be connected with the company and on the Board of Directors but will be entirely in the Financial Department, associated with Mr. C. L. Patterson, who is the "Banker who turned Grocer." Mr. Patterson came to the U-Save System soon after it organized. Prior to then he

(Testimony of Mrs. Addie Driscoll.)

had been Vice President and Manager of the First National Bank of Yuma and Yuma National Bank for eight years. In 1926 he organized and became President of the Yuma Trust and Holding Company, leaving that company in February, 1930, to join the U-Save Holding Corporation. [205]

Mr. Patterson brings to Sanders U-Save System a recognized ability in corporate organizations and finance, having wide acquaintance in southwestern banking circles and a knowledge of legal financial questions gained from long experience in the banking field. The opportunities which the U-Save System presents attracted him to this organization.

We do not think that there is a chain store organization in the United States with a personnel as capable as the above referred to. Under the old arrangement in single state organizations it was impossible to secure a large group of outstanding men of this caliber on their directorate.

Mr. A. E. Sanders, the President of this company has accomplished something in Arizona which, we do not think has been equalled. The first Arizona unit was opened June 26, 1929, and in this short term has established 24 stores, doing a business of over $2,000,000.00 per annum and we think they are the best group of stores in the United States. As you all know it costs a considerable amount of money to open and develop stores as rapidly as these and in order to protect all interests and make it the outstanding chain of stores in

(Testimony of Mrs. Addie Driscoll.)

America we decided to make this change in our general plan. Furthermore under this new change in plan the Sanders Stores of America will guarantee the payment of all interests and principal on debentures and the interest on the preferred stock, outstanding of the Arizona company.

They will also establish a Re-sales Department, to handle the resale of securities and under this new plan and set-up we have no doubt but what it will create an active market for your securities as well as show you wonderful returns for we firmly believe that your original investment in the United Clarence Saunders Stores, Inc., is going to be one of the most profitable and pleasant that you have ever made.

Sincerely yours,

UNITED CLARENCE SAUNDERS STORES, INC.

By G. C. PARTEE,

GCP:MD Secretary."

The Greenbaum defendants duly objected to the receiving of said exhibit in evidence on the ground that there was no proof of mailing and that it didn't tend to connect them with the matters and things charged in the indictment, and [206] it is not binding upon them, or either of them, but the Court overruled said objection, to which ruling counsel for defendants Greenbaum then and there duly excepted.

(Testimony of Mrs. Addie Driscoll.)

The witness resumed: I received the letter marked Government's Exhibit 41-P for identification, through the United States mails at Douglas, Arizona, in a stamped envelope addressed to me. I received the letter dated January 10, 1931, marked Government's Exhibit 41-Q for identification, in a stamped envelope addressed to me at Douglas, Arizona.

Government's Exhibit 41-Q for identification received in evidence as Government's Exhibit 56, which abstracted to the issue is as follows:

> Mimeographed letter to stockholders of United Sanders Stores, Inc., dated January 15, 1931, signed by H. D. Sanders, President, and G. C. Partee, Secretary. States in effect that the company has made considerable expansion during the past year and has in operation 26 retail stores in Arizona, and owns practically all of the outstanding stock of the Piggly-Wiggly Southwestern Co.; that 1930 had been a very hard year and on a whole was an unprofitable year; "That we are pleased to report that the most of our difficulties have been overcome and 1931 looks more than encouraging. * * * The U-Save Holding Corporation, an Arizona corporation, has purchased the control of the common stock of our company, and they are now cooperating with us in the operation of our business. This arrange-

(Testimony of Mrs. Addie Driscoll.)

ment will be very beneficial to the stockholders of our company, as it will greatly reduce our accounting and administrative costs, and give us the benefit of additional purchasing power and complete supervision of all departments at only a fraction of the expense this work has cost us up to the present time. We cannot help but believe that after the changes in out set-up the 'United Sanders Stores, Inc.' will progress faster and more profitably than they have at any time in the past. We expect to open a minimum of 10 new stores during the current year without any increase in our outstanding capital. The company is in good financial position, as will be shown by financial statement as of December 31, 1930, copy of which will be sent to each stockholder as soon as audit is complete. * * *'' Attached to this letter is a notice of special annual meeting of stockholders for the election of three directors and the transaction of any business that [207] may come before the meeting, with blank proxy attached.

The Greenbaum defendants duly objected to the receiving of said exhibit in evidence on the ground that it was hearsay and not binding upon the Greenbaums, and there was not adequate proof of mailing, but the Court overruled said objection, to which ruling counsel for defendants Greenbaum then and there duly excepted.

(Testimony of Mrs. Addie Driscoll.)

The witness resumed: I received the letter of April 9, 1930, marked Government's Exhibit 43 in evidence; I received other correspondence from the Bond and Mortgage Corporation or the Arizona Clarence Saunders Stores, Inc. I do not remember now whether on April 9, 1930, all of my stock had been issued to me. I purchased eighteen shares of preferred stock at $100.00 per share, and I think 560 shares of common stock at $5.00 per share. After I had purchased some of this stock some dividends were paid upon it. I paid cash for some of the stock and was to buy other stock and pay for it as the stock went up and I could sell some of the stock I already had. While I owed some unpaid subscriptions on the preferred stock interest was paid me on the amount that I had already paid in partial payments. It was paid by the Stores Company and was Stores Company stock. I received two dividend payments. I do not remember for what years but I do remember the amounts. One dividend check was for $50.50 and the other for $40.00. I never figured the percentage of dividend but I took their word for it that it was eight percent.

CROSS EXAMINATION.

I called on Mr. Sanders at his office in the warehouse at Phoenix after I purchased my stock. It was about ten [208] months after I made my purchase. The stock was sold to me by Joe Rose, Wayne

(Testimony of Mrs. Addie Driscoll.)

Jackson and Collins. I bought stock from all three of them, though most of it was bought from Joe Rose. After the receipt of the letter of April 9, 1930, I did not buy or contract to buy any additional shares of stock of any kind of the Clarence Saunders Stores, Inc. or any of its successors in name. I have talked to Mr. Gus Greenbaum, or Mr. William Greenbaum, or Mr. Charles Greenbaum, but I did not talk with them, or either of them, about the purchase of stock.

RE-DIRECT EXAMINATION.

I talked to them in their office. I don't recall just when, but at the time I owed some unpaid subscriptions on stock I was up at the Greenbaums' office twice before the 9th of April, 1930, but how long before I couldn't tell you, although I remember that Joe Rose was present in the office. William Greenbaum and Gus Greenbaum were also present. I made no payments on subscriptions of stock after the time I talked to Mr. Sanders. I couldn't say exactly how long prior to the receipt of the letter of April 9, 1930, I had a conversation with Gus and William Greenbaum, but will say it was prior to the date of that letter. Subsequent to that conversation with the Greenbaums I paid for all of the stock I had at the time. I made no further purchases after that conversation, nor after April 9, 1930, and no stock was issued to me after the conversation prior to April 9, 1930. There wasn't much

(Testimony of Mrs. Addie Driscoll.)

said by the Greenbaums because Rose did most of the talking. It was he that sold me most of the stock. It was in regard to straightening out the stock with me that I had already paid for. I came to see about how to get my stock straightened out so I would get what I actually paid for and so I would not have to pay for the rest of the [209] stock. I had that conversation with Joe Rose before one of the Greenbaums, I wouldn't say which one for sure. No one else was present that I remember, except the Greenbaums and Joe Rose. I wouldn't say now whether it was one of the Greenbaums or both of them present, and I couldn't say now or indicate to you which one of them was present.

RE-CROSS EXAMINATION

I bought no more stock after April 9, 1930, nor did I make any further payments on stock that I had already bought after I received the letter dated April 9, 1930.

Thereupon Government's Exhibit 60 was received in evidence, being application for registration of agents in connection with permit No. 4854, showing that some 32 agents were registered by the Stores Company between January 28, 1929, and October 23, 1929. Among those registered were the defendants Gus, Charles and William Greenbaum.

Whereupon

MINOR BISHOP,

called as a witness on behalf of the Government, testified:

I have resided in Mohave County, Arizona, for about two years, but prior to residing in Mohave County I resided in Prescott, Arizona. I came to Yavapai County in 1913. I first came to Arizona in 1896. I am in the stock business and during the years 1929 and 1930 I purchased stock in the Stores Company. I purchased the stock from William Greenbaum. Government's Exhibit 61 introduced in evidence, which abstracted to the issue is as follows:

> Two subscription agreements on Bond and Mortgage Corporation form, each having copy of Permit No. 5246 printed on back,—one in the name of Agnes M. Bishop for 150 shares common stock at $10.00 [210] per share, paid in cash; and one in the name of Minor A. Bishop for 150 shares of common stock at $10.00 per share, paid in cash. Both of these subscription agreements dated August 7, 1930, and were accepted by "Rose & Greenbaum, Subscription Agents."

The witness resumed: I saw this exhibit first in my home in Prescott. My wife was present when I saw it. I only purchased stock one time in the amount of $1,500.00. The Exhibit was signed at

(Testimony of Minor Bishop.)

my home in August 1930. The first time I saw them I did not purchase any stock but my wife did, and later I purchased some. My wife purchased 15 shares of preferred stock. Mr. Greenbaum was not present when I purchased my stock from Mr. Goldberg, but he was present the first time when I discussed the purchase of stock with Mr. Goldberg. My stock was purchased after my wife purchased her stock. The stock was all paid for. We each purchased 15 shares of preferred, and 500 of the common.

Thereupon Government's Exhibit 62 was received in evidence, which abstracted to the issue is as follows:

> Letter from Bond and Mortgage Corporation, signed by M. Loveland, Assistant Secretary, addressed to Minor A. Bishop at Prescott, Arizona, dated August 11, 1930, acknowledging receipt of subscription for 150 shares of common stock, and congratulating him upon having made this excellent investment, and stating "We believe it will prove to be more and more profitable as the years pass and the great chain of self-service grocery stores continues to grow throughout the southwest."

The witness resumed: The letter which you show me, dated August 12, 1930, was received by me in a stamped envelope, addressed to me at the Post Office at Prescott, Arizona.

(Testimony of Minor Bishop.)

Thereupon Government's Exhibit 63 was received in evidence, which abstracted to the issue is as follows:

> Letter of Bond and Mortgage Corporation, dated August 12, 1930, addressed to Minor A. Bishop, at Prescott, Arizona, signed by M. Loveland, [211] Assistant Secretary, enclosing stock certificate for stock purchased, and stating "we earnestly believe that as time goes by, you will find that your investment in United Clarence Saunders Stores, Inc., will be one of the most profitable ever made. The stores were created by a genius in this particular line of merchandising. Clarence Saunders, through his wonderful merchandising methods, established the Piggly-Wiggly stores, and when retired had built a business in a few years that was prosperous and known all over the world, and his new stores are just as much advanced in modern merchandising as his old stores were over the old style grocery. With Clarence Saunders' guiding hands over the different stores to be established under his name, we can only say one thing and that is, within a few years you will find Clarence Saunders Stores the outstanding food distribution stores in the world." The letter goes on to say that the company trusts that he will take further advantage of the facilities for investment counsel and service as he may require.

(Testimony of Minor Bishop.)

The witness resumed: The letter dated January 10, 1931, in which the statement dated December 31, 1930, was enclosed, was received by me enclosed in a stamped envelope addressed to me at Prescott, Arizona.

Thereupon Government's Exhibit 64 was received in evidence, which abstracted to the issue is as follows:

> Form letter from United Sanders Stores, Inc., dated at Phoenix, Arizona, January 10, 1931, addressed to the stockholders, signed by G. C. Partee, Secretary. Stated the rapid progress the company had made, and that on account of the business depression the company took a market loss on merchandise it had purchased from the Del Monte company; that the Clarence Saunders Stores, Inc., at Memphis, Tennessee, was involved in financial difficulties and was placed in the hands of a receiver; that the Clarence Saunders Corporation had no financial interest in the Arizona company except receipt of royalties under the concession, but nevertheless the failure affected the credit and confidence of the trade in all units operating under concessions from the Clarence Saunders Corporation; that on account of this loss of confidence the Arizona company's business had become so affected that it was required to abandon its expansion program and change its en-

(Testimony of Minor Bishop.)

tire set-up. "The result was a heavy loss to your company, due to conditions over which it had no control." The letter further states that in October 1930 the U-Save Holding Corporation purchased control of [212] the common stock of the United Sanders Stores, Inc. and since that time had been in active management of its affairs, and that this new change in management cut expenses approximately $50,000.00 per annum. The letter further states that the warehouses were operating at a heavy loss and that it was costing them better than 7% to serve the stores through its own warehouses. That the U-Save Holding Corporation purchased the warehouse stocks at actual inventory and agreed to serve the United Sanders Stores at cost plus 5%; that the warehouse stocks inventoried at approximately $110,000.00 and that the U-Save Holding Corporation gave the Sanders Stores $69,100.00 in preferred stock and paid off approximately $40,000.00 of Sanders Stores current indebtedness, and had extended them a line of credit for merchandise, which at the close of the year amounted to $33,842.72; that this deal was very advantageous to the stockholders of the United Sanders Stores; that "the company is now in good financial position relative to assets and liabilities"; that before it can pay dividends upon its present capitalization it would have

(Testimony of Minor Bishop.)

to build up its reserves. Attached to this letter is a statement prepared by A. E. Skeats, Certified Public Accountant, as of December 31, 1930, showing:

Current assets	$423,652.91
Fixed assets	170,316.93
Net Outside Investments	87,685.10
Deferred Assets	74,076.47
Organization and Development	259,963.24
Concessions	151,000.00
Total Accounts Payable	63,491.17
Payroll	2,069.66
Notes	10,689.74
Debenture Bonds outstanding—	
Less in Treasury	83,900.00
Net Worth	939,944.06

The Greenbaum defendants duly objected to the receiving of said exhibit in evidence on the ground that it was incompetent, irrelevant and immaterial, and not binding upon or applicable to the Greenbaums, or any of them, and as to them, and each of them, it is pure hearsay, and there is not sufficient proof of mailing, but the Court overruled said objection, to which ruling counsel for defendants Greenbaum then and there duly excepted. [213]

CROSS EXAMINATION

I never at any time had any dealings whatever with A. E. Sanders. I was not present when my

(Testimony of Minor Bishop.)

wife bought her stock. I bought my stock from a man by the name of Goldberg, and not from any one of the Greenbaums. I gave Goldberg my check for the stock.

Whereupon

JOHN MULDOON,

called as a witness on behalf of the Government testified:

I have resided at Seligman, Arizona, or near there for about eleven years, and have been in Arizona for about twenty-one years. I am a Stationery Engineer. In 1930 I purchased some stock in the Arizona Clarence Saunders Stores, Inc. The first purchase was about May 1930. I made my first purchase of stock from Charles Greenbaum in my cabin in Seligman, Arizona. I had a conversation with Charles Greenbaum in my cabin and in substance I told him I was very old and that I had rheumatism at the time, etc. and I was too old to buy stocks and bonds, and he said that I would get back the money in three years or before. He told me it was a great company and that they were not allowing anybody in there but people that belonged to the Masonic Order and that he was giving me a chance to get in on it because I belonged to the Masonic Order. He told me that the company was the Sanders Chain Stores of Arizona. Subsequent

(Testimony of John Muldoon.)

to the purchase of the first block of stock I bought another $1,000.00 worth, for which I gave Charles Greenbaum $800.00 in cash and two Masonic bonds of $100.00 each. The second block of stock was purchased from Charles Greenbaum in my cabin at Seligman. I purchased some more stock on the date I signed the instrument you show me, and I gave $3,000.00 in cash and $5,000.00 [214] of gold debentures I had for common stock. This last transaction was with Sam Greenbaum (not a defendant) and the instrument was filled out by him. At first I purchased $5,000.00 of gold debentures, then Greenbaum came back and changed these gold debentures for common stock, and I bought $3,000.00 more of common stock. That transaction, as I said before, was with Greenbaum.

Thereupon the Government offered in evidence as one Exhibit, the first instrument dated May 22, 1930, one dated July 29, 1930, and one dated August 6, 1930.

VOIR DIRE EXAMINATION

The instrument that bears No. 5727 in the upper right hand corner was filled in by Charles Greenbaum. The yellow sheet which is numbered 5985, was filled in by Sam Greenbaum, and the one which bears No. 5989, also was filled in by Sam Greenbaum.

At this juncture the instruments were admitted

(Testimony of John Muldoon.)

as one exhibit, to-wit, Government's Exhibit 65, which abstracted to the issue is as follows:

> Three subscription agreements on Bond and Mortgage Corporation form, Arizona Corporation Commission permit printed on back of each, signed by John Muldoon, Subscriber. Subscription 5727, dated May 22, 1930, for 4200.00 worth of United Clarence Saunders Stores, Inc. 8% debentures, shows debentures paid for in cash in full—by cash and $200.00 worth of Masonic bonds, to Greenbaum & Rolfe, Subscription Agents.
>
> Subscription 5985, dated July 29, 1930, for 400 shares of common stock of United Clarence Saunders Stores, Inc., at $7.50 per share. Total $3,000.00. Paid in full to S. M. Greenbaum, Subscription Agent.
>
> Subscription 5989 for 400 shares of common stock of United Clarence Saunders Stores, Inc. at $7.50 per share, exchanged for 3 debentures of the same company of $1,000.00 each.

The witness resumed: The letter dated July 31, 1930, [215] was received by me through the mail enclosed in a stamped envelope addressed to me at Seligman, Arizona.

Whereupon the Government introduced in evidence Government's Exhibit 66, which abstracted to the issue is as follows:

(Testimony of John Muldoon.)

Letter from Bond and Mortgage Corporation, dated July 31, 1930, signed by M. Loveland, Assistant Secretary, enclosing stock certificate No. 1914 for 400 shares of common stock of United Clarence Saunders Stores, Inc. This letter is identical with Government's Exhibit 63 heretofore referred to.

Whereupon the Government introduced in evidence Government's Exhibit 67, which abstracted to the issue is as follows:

Three stock certificates of United Clarence Saunders Stores, Inc., being numbered 1914, 1978 and 2007, respectively, for 400, 400 and 267 shares of common stock, and dated respectively, July 31, 1930, August 12, 1930 and August 19, 1930. The certificates were signed by G. C. Partee, Secretary, and K. C. Van Atta, Vice-President.

The witness resumed: The total amount of my purchases of stock and securities in Arizona Saunders Stores was $8,000.00.

CROSS EXAMINATION

I never at any time whatever had any dealings with A. E. Sanders. My dealings were with Charley Greenbaum. I never saw Mr. Sanders in my life before now.

(W. R. Montgomery, called as a witness on behalf of the Government, and not having his records with him, was excused).

Whereupon

OSCAR SCHMIDT,

called as a witness on behalf of the Government, testified: [216]

I received the three letters you show me, dated July 13, 1929, March 14, 1929, and January 31, 1931, through the mails at Globe, Arizona. They were all in stamped envelopes addressed to me. The letters and documents referred to were received in evidence as Government's Exhibits 70, 71 and 72, which abstracted to the issue are as follows:

EXHIBIT 70

Letter from Financial Department, Arizona Clarence Saunders Stores, Inc., dated March 14, 1929, signed by M. Loveland, Secretary to Manager, acknowledging receipt of subscription for 10 shares of preferred stock and 50 shares of common stock.

EXHIBIT 71

Letter from Financial Department, Arizona Clarence Saunders Stores, Inc., dated July 13, 1929, signed by M. Loveland, Secretary to Manager, acknowledging receipt of subscription for 10 shares of preferred stock and 50 shares of common stock.

EXHIBIT 72

Letter from United Sanders Stores, Inc., dated January 31, 1931, signed by G. C. Partee, Secretary and Treasurer. The letter was with reference to $1,000.00 paid on subscription No. 5460 for

(Testimony of Oscar Schmidt.)

$2,500.00. States that after crediting the interest up to December 31, 1929, amounting to $10.64, there is a balance due of $1,489.36; that the subscriptions are a bona fide agreement and not subject to cancellation, and that the selling agents had been paid full commission on subscription, and to cancel them would mean a loss to the company or to the subscriber. Letter extends reasonable time in which to pay for the subscription before taking advantage of forfeiture provision.

The witness resumed: I think I bought $3,200.00 worth of stock at different times, for which certificates were issued to me. I received a dividend once and a credit of $10.64 interest on the part of the subscription I had paid. I owed a balance of $1,489.36, which I never paid.

CROSS EXAMINATION

I have never had any dealings at any time with Mr. [217] Sanders, nor have I ever seen him before. I never had any stock transactions with the Greenbaums, or any of them, and never heard of them until today.

Whereupon

CATHERINE RYAN,

called as a witness on behalf of the Government, testified:

I reside at Prescott, Arizona, and operate a rooming house there. I have resided there for thirty-

(Testimony of Catherine Ryan.)

eight years. I purchased stock and securities in the Arizona Clarence Saunders Stores, Inc. during the year 1930. The first purchase was in the fore part of August, 1930, and was made from a man by the name of W. L. Raney. I didn't purchase stock from any of the Greenbaums, but I gave Mr. Charles Greenbaum my last payment of $300.00 in my check. This was in payment of stock I had bought from one of the salesmen.

Thereupon Government's Exhibit 73 was admitted in evidence, which abstracted to the issue is as follows:

> "7/21/30, Received of Catherine Ryan, Three Hundred & no/100 Dollars.
>
> BOND AND MORTGAGE CORPORATION,
> By: Chas. Greenbaum."

The witness resumed: That was the only transaction had with any of the Greenbaums directly. The letter dated July 22, 1930, was received through the mail by me at Prescott, Arizona, and was enclosed in an envelope addressed to me. I also received a letter dated July 10, 1929, through the mails in the same way, at Prescott.

Thereupon Government's Exhibits 74 and 75 were admitted in evidence, which abstracted to the issue are as follows: [218]

(Testimony of Catherine Ryan.)

EXHIBIT 74.

Letter from Bond and Mortgage Corporation, dated July 22, 1930, signed by M. Loveland, Assistant Secretary, acknowledging receipt in the amount of $300.00, and stating that the account would be credited with $315.00 as per arrangements with the representative, and that certificates would be issued in a few days.

EXHIBIT 75.

Letter of Arizona Clarence Saunders Stores, Inc., dated July 10, 1929, signed by E. B. Horne, Secretary. Enclosing stock certificates for 3 shares preferred and 15 shares of common stock in Arizona Clarence Saunders Stores, Inc. The balance of the letter is almost identical with Exhibit 63.

The witness resumed: When I paid the $300.00 to Charles Greenbaum he gave me credit for $315.00, and I asked him why he wanted the money paid like this, and he said we are going to dismiss one of the stenographers from the office and cut down our expenses, and so I gave him a check for $300.00 on The Valley Bank at Prescott. I bought 165 shares of the common stock and 3 shares of the preferred stock in the Arizona Clarence Saunders Stores, Inc. The arrangements I had with the Sanders salesman, D. C. Clark, was that I was to pay so much every month, until I paid the whole thing. The last I paid was the $300.00 to Charles Greenbaum. I received

(Testimony of Catherine Ryan.)

$13.00 dividends once. I never had any conversation with Charles Greenbaum at any time in regard to the company. My conversation was with D. D. Clark. The first one I ever talked to about the purchase of any stock was W. L. Raney. I did not make any purchase the first time he called, but did later. I never had any conversation with either of these salesmen in regard to the Arizona Clarence Saunders Stores, Inc. The proposition was simply presented to me. Mr. Raney was not a salesman. He had the stock already and transferred it to me. [219]

(At this juncture the defendant A. E. Sanders, in open court, before the Jury, through his counsel Duane Bird, requested leave to change his plea of "Not Guilty" to "Nolle Contendere". No objections were offered on behalf of the Government and the plea of "Not Guilty" heretofore entered was set aside and the plea of "Nolle Contendere" on behalf of the defendant A. E. Sanders entered.)

(A. E. Sanders was sworn as a witness on behalf of the Government, and admonished by the Court that the rule had been invoked, and was instructed that he was not to discuss the evidence he was about to give with any person other than the attorneys and Mr. Means, the Post Office Inspector. He was instructed to retire to the witness room in charge of the bailiff and hold himself subject to call.)

Whereupon

W. R. MONTGOMERY,

called as a witness on behalf of the Government, testified:

I am connected with The Valley Bank and Trust Company at Phoenix, Arizona, and have been for some time. Referring to Government's Exhibit 68 for identification, I will say that I have brought with me the records of the bank in connection with that account, and also in connection with the account shown in Government's Exhibit 69 for identification. Referring to Exhibit 76 for identification, we received that instrument from this corporation, the Clarence Saunders Stores, Inc. I could not say just what individual presented it.

Thereupon the Government introduced Exhibit 76 in evidence, which abstracted to the issue is as follows:

> Instructions to The Valley Bank at Phoenix, Arizona, dated July 2, 1929, with reference to account in that bank, giving copy of resolution passed by the Board of Directors at a meeting held June 29, 1929, authorizing A. E. Sanders, President, to sign or [220] endorse checks, drafts, notes, or other negotiable paper or securities on any and all depositories of Arizona Clarence Saunders Stores, Inc., without any countersignature, and authorizing Warfield Ryley to sign checks or drafts on any banks or depositories of the Arizona Clarence Saunders

(Testimony of W. R. Montgomery.)

Stores, Inc., when duly countersigned by Willis M. Dent, M. V. Lee or E. B. Horne. The signatures at the bottom of these instructions are: A. E. Sanders, E. B. Horne, Warfield Ryley, Willis M. Dent, M. V. Lee and E. A. Lassale.

The Greenbaum defendants duly objected to the receiving of said exhibit in evidence on the ground that it was secondary evidence and not the best evidence, and not binding upon them as it was hearsay, but the Court overruled said objection, to which ruling counsel fer defendants Greenbaum then and there duly excepted.

The witness resumed: The letter in evidence as Government's Exhibit 76 was the letter on which these accounts, Government's Exhibits 68 and 69 for identification, were opened.

Thereupon the Government offered in evidence Exhibits 68 and 69 for identification, which were received as evidence as Government's Exhibits 68 and 69, photostatic copies of which are as follows: [221]

SHEET NO ____ NAME ARIZONA CLARENCE SAUNDERS STORES DIVIDEND ACCT. ACCT. NO. ____

ADDRESS ____

STANDARD FORM M B S PRINTED IN U S A

CHARLES B. MADLEY CO. POTHHOLDERS

REG U S PAT OFF STANDARD BANK LEDGER LEAF

DATE	CHECKS	DEPOSITS	DATE	BALANCE
		BALANCE FORWARD	OCT 26 '29	478.25 * -
OCT 30 '29	.38 -		OCT 30 '29	477.87 * -
NOV 4 '29	.91 -		NOV 4 '29	476.96 * -
NOV [illegible]	.33 -		[illegible]	476.63 * -
NOV 13 '29	.25 -		NOV 13 '29	476.38 * -
NOV 22 '29	.41 -		NOV 22 '29	475.97 * -
NOV 25 '29	2.47 -		NOV 25 '29	473.50 * -
NOV 26 '29	.13 -		NOV 26 '29	473.37 * -
DEC 3 '29	.17 -		DEC 3 '29	473.20 * -
DEC 7 '29	.13 -		DEC 7 '29	473.07 * -
DEC 10 '29	2.67 -		DEC 10 '29	470.40 * -
[illegible]	[illegible]		[illegible]	[illegible]

Govt Exhibit No. 68

Marked for
Identification only
NOV 13 1934
J. H. Baker, Clerk
U. S. DISTRICT COURT
DISTRICT OF ARIZONA
By Georgia Miller
Deputy Clerk

Case No. 2417-Phx
U.S.A. vs. Saunders et al

Govt Exhibit No. 68

Admitted and Filed
NOV 14 1934
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
By Georgia Miller
Deputy Clerk

Case No. 2417-Phx
U.S.A. vs. Saunders et al

SHEET NO _____ NAME _____ ACCT NO _____

ADDRESS _____

STANDARD FORM M B S PRINTED IN U S A

CHARLES M HADLEY CO, PATHFINDERS

REG U S PAT OFF STANDARD BANK LEDGER LEAF

DATE	CHECKS			DEPOSITS	DATE	BALANCE
				BALANCE FORWARD		
	–					
SEP 7 '29	.38 –				SEP 7 '29	573.61 * –
SEP 9 '29	.84 –	.64 –	.67 –		SEP 9 '29	571.46 * –
SEP 9 '29	.38 –				SEP 9 '29	571.08 * –
SEP 11 '29	1.33 –				SEP 11 '29	569.75 * –
SEP 16 '29	.49 –				SEP 16 '29	569.26 * –
SEP 16 '29	6.67 –				SEP 16 '29	562.59 * –
SEP 17 '29	.17 –				SEP 17 '29	562.42 * –
SEP 19 '29	.50 –				SEP 19 '29	561.92 * –
SEP 21 '29	2.00 –	.32 –	.99 –		SEP 21 '29	558.61 * –
SEP 23 '29	.53 –				SEP 23 '29	558.08 * –
SEP 28 '29	4.50 –				SEP 28 '29	533.58 *
SEP 28 '29	.53 –				SEP 28 '29	533.05 *
OCT 4 '29	10.00 –				OCT 4 '29	523.05 * –
OCT 8 '29	37.82 –				OCT 8 '29	485.23 * –
OCT 9 '29	1.91 –	.38 –			OCT 9 '29	482.94 * –
OCT 14 '29	1.33 –				OCT 14 '29	481.61 * –
OCT 15 '29	.78 –				OCT 15 '29	480.83 * –
OCT 1[illegible]	1.[illegible] –				OCT 1[illegible]	479.[illegible] *
OCT 1[illegible]	1.7 –				OCT 1[illegible]	[illegible] *
OCT 25 '29	.67 –				OCT 25 '29	478.25 * –

ARIZ CLARENCE SAUNDERS, INC

DIVIDEND ACCT

305 S 2 AVE, CITY

IN ACCOUNT WITH

THE VALLEY BANK

PHOENIX, ARIZONA

FROM OCT 31 1929 TO NOV 30 1929

DATE	CHECKS	DEPOSITS	DATE	BALANCE
		BALANCE FORWARD		477 87
[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]
NOV 22 '29	.41 -		NOV 22 '29	475.97 * -
NOV 25 '29	2.47 -		NOV 25 '29	473.50 * -
NOV 26 '29	.13 -		NOV 26 '29	473.37 *

17-
18
13
2.67

470.40 PAID

Check No. #662

Date 12-1-1929

Govt Exhibit No. 67

Marked for Identification only

NOV 18 1934

[illegible] Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

By [illegible] Deputy Clerk.

Case No. C-417 Phx.

Ollie [illegible] vs Sanders et al

Govt Exhibit No. 67

Admitted and Filed

NOV 14 1934

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

By [illegible] Deputy Clerk

Case No. C-417 Phx.

Ollie [illegible] vs Sanders et al

Please Examine At Once and Report Any Differences Direct to the Auditor. Account Is Considered Correct If Not Disputed Within Ten Days and Vouchers Will Be Destroyed

VERIFIED BY

ARIZ[illegible] AR-NCE SAUNDERS, INC
DIVIDEND ACCT
% TOM H. BRANDT, COMPT
305 S 2 AVE, CITY

IN ACCOUNT WITH
THE VALLEY BANK
PHOENIX, ARIZONA

FROM NOV 30 1929 TO DEC 31 1929

DATE	CHECKS	DEPOSITS	DATE	BALANCE
		BALANCE FORWARD		473 37
DEC 7 '29	.13 –		DEC 7 '29	473.07 * –
DEC 10 '29	2.67 –		DEC 10 '29	470.40 * –
DEC 13 '29	470.40 –		DEC 13 '29	.00 * –

Please Examine At Once & Report Any Discrepancies Direct To This Office
If Not Received Within Ten Days This Statement And Your Vouchers Will Be
Considered Correct

VERIFIED BY _____

Please Advise Us Promptly Of Any Change In Your Address

(Testimony of W. R. Montgomery.)

The Greenbaum defendants duly objected to the receiving of said exhibits in evidence on the following grounds:

"Mr. REIN: If the Court please, the defendants Greenbaum, and each of them, object to the introduction in evidence of 68 and 69 for identification, upon the following grounds: In the first place, they are not binding upon the defendants Greenbaum, no connection having been demonstrated, even by indirection between them and this account or this concern. In the second place the entries in these slips are merely entries taken from other books and other original records and therefore no exception to the hearsay rule as a book of original entry. In the third place there is a description of one exhibit 68 for identication and 69 for identification, which is merely descriptive with no supporting information that it is what it purports to be, that description on the top of those documents will not prove to this jury that that is what these accounts are and obviously the last entry on the last page is certainly not what the accounts purport to be.

The COURT: Let me see it. Mr. Witness, are the copies of duplicates?

A No, I think those are the originals, one of them is the statement of the account and the other is our original record on the dividend account, that ledger sheet.

(Testimony of W. R. Montgomery.)

Q This is the original sheet from the books of the bank?

A Yes sir.

Q It is. [227]

A That dividend account.

Q And the other one?

A This is the statement which is kept in duplicate. This is our permanent record here.

Q That was sent to the depositor?

A Yes.

Mr. REIN: May I add one further objection while you are considering those documents?

The COURT: You may.

Mr. REIN: The instruments are evidently, purported to show an account of the Saunders Stores. I do not believe that is any evidence whatever as to the Greenbaums without any foundation having been laid that there was any connection between them and this account or even any knowledge of them and I think they are getting the cart before the horse.

The COURT: That is a question of the order of proof. The objection is overruled. Admitted in evidence.

Mr. REIN: Exception."

The witness resumed: Referring to Government's Exhibit 68, the column headed "checks" indicates checks written on the account and paid against the account, and the figures over the heading "bal-

(Testimony of W. R. Montgomery.)

ance" indicates the balance in the account after the checks were paid. The same applies to Government's Exhibit 69 in evidence. The column "deposits" indicates whether or not deposits were made to the account and the amounts shown. The signatures attached to Government's Exhibit 76 in evidence are the signatures the bank recognized as authorized to draw checks on the accounts testified to. [228]

CROSS EXAMINATION

I am Assistant Cashier of The Valley Bank, but I did not make the entries on the exhibits which have been introduced in evidence. I do not know who made those entries and I have not made any efforts to ascertain whether the person who made the entries is available or not. I do not even know from my personal knowledge that they are correct, nor do I know what the actual transactions were as evidenced by those accounts. There are no other records in the bank evidencing what these exhibits purport to evidence. The customer makes an entry on a deposit slip when the deposits are made, and that slip is the bank's original record. The deposit slips are transcribed to the ledger sheet, and also the statement sheet. As to withdrawals, the checks are the original records. I do not know whether or not the entries are true and correct but assume it from the fact that it is a usual bank entry. If we had made an error I assume it would have been corrected on the same day it happened. From my own

(Testimony of W. R. Montgomery.)

personal knowledge I cannot say whether the entries on the deposit slips were correctly transcribed on the bank statements. The same is true as to exhibit showing withdrawals and checks. From my own personal knowledge I do not even know the purpose of the account. The designation of the account is up to the depositor, as the bank has no means of knowing for what actual purpose the account is created.

"Mr. REIN: We move to strike from the files government's Exhibits 68 and 69 on the grounds previously stated in our objection to the introduction of these exhibits.

The COURT: Motion denied.

Mr. REIN: Exception." [229]

Whereupon

J. M. NIXON,

called as a witness on behalf of the Government, testified:

I am familiar with the signature of G. B. Greenbaum and will state that the signature on Exhibit 42-A for identification is his signature.

Whereupon,

OLIVER FRYE,

called as a witness on behalf of the Government, testified:

(Testimony of Oliver Frye.)

I live at Fort Huachuca, Arizona, and have lived in Arizona about twenty-two years. During the years 1929 and 1930 I purchased some stock in the Arizona Clarence Saunders Stores, Inc. from Greenbaum Brothers. I received the letter, Government's Exhibit 42-A for identification, in an envelope addressed to me at the Post Office at Garden Canyon, Arizona.

Thereupon Government's Exhibit 77 was admitted in evidence, which abstracted to the issue is as follows:

> Letter from Financial Department of Clarence Saunders Stores, Inc., dated January 12, 1929, signed by G. B. Greenbaum, Financial Manager, acknowledging receipt of subscription for stock, and stating that "you can rest assured that the company's business will always be maintained on the highest possible business methods."

The witness resumed: I purchased $10,000.00 worth of stock or securities in the Arizona Clarence Saunders Stores, Inc. I think I bought some stock before January 12, 1929.

Whereupon

MRS. J. O. PARSONS,

called as a witness on behalf of the Government, testified:

I live in Flagstaff, Arizona, and have resided in Arizona for thirty years. I purchased some stock and securities in the Arizona Clarence Saunders Stores, Inc. The stock was purchased from Reinhardt and Jackson, Collins and Charles Greenbaum. The check you hand me was to Charles [230] Greenbaum for the Clarence Saunders stock.

Whereupon the Government introduced the check in evidence as Government's Exhibit 78, which abstracted to the issue is as follows:

> Check on The First National Bank of Flagstaff, Arizona, dated May 27, 1930, for $223.63, payable to the order of Bond and Mortgage Corporation, signed by Mrs. J. O. Parsons, Endorsed "Pay to the order of Phoenix National Bank—Bond and Mortgage Corporation."

The witness resumed: I had a conversation with Charles Greenbaum in regard to the stock in May 1929, at Flagstaff, Arizona. I don't recall anyone being present besides myself and Charles Greenbaum. That was at a time when I purchased some stock. Charles Greenbaum told me what a great opportunity it was for me to buy more stock and invest in the Clarence Saunders Stores. I don't

(Testimony of Mrs. J. O. Parsons.)

recall that he said any more. I believe he told me that they had twenty-five stores in New Mexico and Arizona, and forty in California, and that they all had the buildings and fixtures paid for. He said that they had purchased land in Winslow, Flagstaff and Williams and had it paid for and within ninety days would have the buildings up and would start business. I bought 20 shares of preferred stock at $100.00 per share, 100 common at $5.00 per share, 75 common at $7.50 per share, and 600 in gold bonds. I was never paid any dividends on the stock, but I did receive about $55.00 interest on deferred payments. This check, Exhibit 78, was returned to me from my bank, and the amount of the check was deducted from my account in the bank, and was endorsed by the Bond and Mortgage Corporation. I received the letter shown me, dated November 26, 1929, in the Post Office at Flagstaff, Arizona.

Thereupon the Government introduced the letter in evidence as Government's Exhibit 79, which abstracted to the issue is as follows: [231]

> This is a form letter dated November 26, 1929, signed with the rubber stamp facsimile of A. E. Sanders' signature, and is identical with Government's Exhibit 48, heretofore described.

The witness resumed: I received the letter dated May 29, 1930, through the mail at the Post Office at Flagstaff, Arizona, enclosed in a stamped envelope addressed to me.

(Testimony of Mrs. J. O. Parsons.)

The letter was introduced in evidence as Government's Exhibit 80, which abstracted to the issue is as follows:

> Letter from Bond and Mortgage Corporation, dated May 29, 1930, signed by M. Loveland, and acknowledges receipt of order for 75 shares of common stock in United Clarence Saunders Stores, Inc., and stating that they are crediting the account with $400.00 on 20 shares of Packard stock turned in and that the balance of $162.50 is to be paid in ten months. The balance of the letter is almost identical in phraseology with Government's Exhibit 62, heretofore described.

The witness resumed: The conversation I had with Charles Greenbaum lasted probably one-half hour, and I have stated all I remember of it.

Whereupon

JOHN CHARON,

called as a witness on behalf of the Government testified:

I reside in Phoenix, Arizona, and have resided here since April 1929. I bought $2,100.00 worth of stock from J. M. Nixon and a fellow by the name of Nowell. The stock certificates were issued to me and I was paid two dividends, one for $160.00 and one for $80.00. This, I believe, was in 1930. The

(Testimony of John Charon.)

letter you show me, dated July 12, 1929, was received through the mail in a stamped envelope addressed to me at my house in Phoenix, Arizona.

The letter was introduced in evidence as Government's Exhibit 81, which abstracted to the issue is as follows: [232]

> Letter from Arizona Clarence Saunders Stores, Inc., dated July 13, 1929, signed by E. B. Horne, Secretary, enclosing stock certificates for 20 shares of preferred and 100 shares of common stock in Arizona Clarence Saunders Stores, Inc. The balance of this letter is almost identical in phraseology and form with Government's Exhibit 63 in evidence, heretofore described.

The following objection and exception was made:

> Mr. WHITNEY: We object to it on the ground no foundation has been laid for its introduction, it plainly shows on its face it is signed by E. B. Horne and there has been no connection shown between Horne and the Greenbaums, and further it is cumulative and incompetent, irrelevant and immaterial, and no adequate proof of mailing.
>
> The COURT: Objection overruled. Admitted as Government's Exhibit 81.
>
> Mr. WHITNEY: Exception."

TOM H. BRANDT,

recalled as a witness for the Government testified.

Thereupon the Government offered in evidence three documents, which were admitted in evidence as one document, as Government's Exhibit 82, photostatic copy of which is as follows: [233]

ARIZONA CLARENCE SAUNDERS STORES, INC. CHECK Nº 4517

PHOENIX, ARIZONA November 19, 1929

PAY TO THE ORDER OF Greenbaum Brothers $1025.00

THE SUM OF: 1025 AND 00 CTS DOLLARS

TO FIRST NATIONAL BANK OF ARIZONA
911 PHOENIX, ARIZONA

BY _____

BY _____

ARIZONA CLARENCE SAUNDERS STORES, INC. CHECK Nº 4517

PHOENIX, ARIZONA November 19, 1929

PAY TO THE ORDER OF Greenbaum Brothers $1025.00

OFFICE COPY

DOLLARS

TO FIRST NATIONAL BANK OF ARIZONA
911 PHOENIX, ARIZONA

BY _____ PRESIDENT

BY _____

ARIZONA CLARENCE SAUNDERS STORES, INC. Nº 4517

	YOUR DATE	AMOUNT OF INVOICE	DEDUCTIONS AMOUNT	DEDUCTIONS EXPLANATIONS	NET AMOUNT
	COMMISSION Report 425				1025.00

Govt Exhibit No. 2

Admitted and Filed
NOV 14 1934
J. [illegible], Clerk,
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
By _____ Deputy Clerk.

Case No. C-419-Phx
MW vs Sanders et al

DISTRIBUTION 438

108

CLARENCE SAUNDERS STORES, INC.

FINANCIAL DEPARTMENT

SUBSCRIPTION RECORD FOR [illegible] AUDITED BY 855

11/8/29 N 10

NO. 425

SUBSCRIPTION NUMBER	SUBSCRIBER	TOTAL SUBSCRIPTION	CASH PAYMENT	DUE FINANCIAL DEPARTMENT: SALESMAN	DIST. MANAGER	DUE GENERAL OFFICE: OFFICE	BALANCE OF SUBSCRIPTION	CASH
5180	D.O.Roe, Whipple, Arizona 200C 1000.00	1000.00	✓	27 62.50		137.50 ✓	—	1000.00
5653	H.P.Easter, c/o A.S.& L. Haydee, Arizona 8P 500.00 25C 125.00	525.00	✓	40 15.62 38 46.88		62.50 ✓	325.00	200.00
6237	Barnetta Ball Bentley Randolph, Arizona 10P 1000.00 50C 250.00	1250.00	✓	45 31.25 40 46.87 55 46.88		125.00 ✓	750.00	500.00
6056	Frank R.Miller, 542 E.Washington St., Phoenix, Ariz. 3P 300.00 150 75.00	375.00	✓	34 9.37 55 28.13		37.50 ✓	225.00	150.00
5782	T.A.Simpson Quartzite, Arizona 5P 500.00 25C 125.00	525.00		60 31.25 58 31.25		62.50 ✓	—	525.00
5182	Barnetta Ball Bentley Randolph, Arizona 10P 1000.00 50C 250.00	1250.00		45 31.25 40 46.88 55 46.87		125.00 ✓	750.00	500.00
		5125.00		475.00		550.00	2050.00	3075.00

$3300.00

33 sales on #16 $1875.00

65 sales on #17 $1775.00

$3650.00

PAID

Check No. 4

Date NOV 19 1929

Stock payments:

Corona M. Inville — 15.00

#1659 — T.A. Baker — 10.00

— Lulu Ramsey, Payment in full — 27.08

R. L. Scott — 324.93

Total Cash 3452.01

195

PHOENIX OFFICE

INSTALLMENT COLLECTIONS MAILED IN

425-A
November 20, 1929,

5080	.Beuleh L. Brown	75.00
1880	Frances L. Brown	31.50
753	V.M. Brown	12.60
2686	J.C. Bruner	600.00
1165	Wm. Burgess	13.50
246	Ches. R. Clarkson	8.00
248	Phyllis Clerkson	8.00
249	Josephine Clarkson	8.00
247	Mrs. C.R. Clarkson	8.00
1904	Mrs. M.J. Cosgrove	15.00
373	W.D. Forsyth	18.90
2784	Mr. and Mrs. P.E. Gillespie	37.50
1769	Jos. H. Grefton	7.50
5464	Catherine L. Hamilton	60.00
	" " " " "	45.00
711	O.C. Hing	21.50
2442	John F. Lewis	7.50
5073	McGee Bros.	8.25
173	R.O. Morrison	12.60
2636	Vivien Pugsley	30.00
5563	Retta M. Reese	7.00
5205	E. Irvin Roberts	7.50
5204	" " " "	15.00
1284	Floyd Thomes	4.30
2067	C.M. Whitecre	31.50
		1095.65

(Testimony of Tom H. Brandt.)

The witness resumed: Government's Exhibit 82 in evidence is a report showing the original subscriptions obtained from persons subscribing to our stock. It gives the name, the total amount of their subscription, and the amount of down payments received at that time, the amounts of commissions computed on such subscriptions and the accumulated totals thereof. The monetary values were then entered into our accounting system, and we used this as an original source of entry for further records. These were original subscriptions and there were no collections on these stock subscriptions by Greenbaum Brothers. The check attached to this exhibit was made and delivered for commissions earned by the Greenbaum Brothers for the sale of stocks for the Clarence Saunders Stores.

During the month of December, 1929, I had a conversation with Mr. Sanders in the presence of Gus Greenbaum. It has been so long ago I don't remember the details, but the substance of the conversation was that he told me he wanted me to prepare dividend checks on the preferred stock that was fully paid up, and to prepare a list of credit entries of those subscriptions of preferred stock that were not paid up, to be computed at 8%, for the year 1929. At that time I told him I didn't see how we could pay a dividend. He asked me why, and I said, "We have no earnings." There was some discussion as to whether we could pay it and I still objected to it on account of the fact that

(Testimony of Tom H. Brandt.)

we had nothing to pay the dividend from. I went back to the outer office and brought in a record showing the operating loss, and there was a discussion as to whether or not there was in fact a loss. I don't remember that Gus Greenbaum said anything at that conversation. Mr. Sanders was the one who wanted me to prepare the checks and the list. [238] Later, in June of 1930, I had a discussion with Gus Greenbaum by himself. Mr. Sanders was not in town at that time. He was in Kansas. The conversation took place down at the warehouse on South Second Avenue. We were due for the payment of a dividend for the first six months of 1930, and we still didn't have any earnings and didn't have any money to pay these checks with. Mr. Greenbaum said that they must be paid. I don't recall any other conversation, but the dividends were paid. The money to pay these dividends came from three sources. Gus Greenbaum l*ao*ned us, I think about $8,000.00, taking in return post dated checks of the Clarence Saunders Stores for that amount of money. I phoned Nogales and through the manager of the Piggly-Wiggly Southwestern, I got another $7,000.00 on account. I phoned the U-Save Holding Company at Yuma to A. E. Sanders' brother, H. D. Sanders, and I couldn't get any money from him, so I held up the issuance of the checks until such time as receipts from the stores were sufficient to cover them. The checks didn't go out all at once, but were handled over a period of three or four days until we could

(Testimony of Tom H. Brandt.)

see enough money in the bank to pay them with. Mr. Sanders signed the checks before he left for Kansas. During the period indicated Clarence Saunders Stock was being offered to the public for sale, but at the end of June 1930 there was very little activity in the sale of the stocks. Stock was being offered for sale at the time by the Bond and Mortgage Corporation. At the time of this conversation with Gus Greenbaum, in June 1930, I showed him the usual operating statement. That statement showed a loss of approximately $96,-000.00.

CROSS EXAMINATION

At the time this conversation with Gus Greenbaum [239] took place, in June 1930, I was comptroller of the company and knew that Gus Greenbaum was not an officer of the company. Neither was he a member of the Board of Directors. I knew that the affairs and management of the company was controlled by the Board of Directors or by Mr. Sanders, as President. I had no control or supervision over the books of the Bond and Mortgage Corporation, except as to the interlocking features of the two sets of accounts. I made no entries and did not direct what entries should go into the Bond and Mortgage Corporation's books, as that was purely a matter of their own bookkeeping. Their books were not kept at the warehouse, as the Bond and Mortgage Corporation was separate and apart

(Testimony of Tom H. Brandt.)

from the Stores Company. The Bond and Mortgage Corporation had no direction or control over what entries should be made in the books of the Stores Company as that was exclusively under my control and under my direction. I prepared the statement, Government's Exhibit 40, for identification, as comptroller of the company. I had told Mr. Sanders in December 1929 that the company had no earnings and that the company was unable to pay the dividend which Mr. Sanders requested be paid, and that was a correct statement of the condition of the company. During the month of December 1929, and particularly at the time I had this discussion with Mr. Sanders, in which I told him the company had no earnings, the company may had at that time on hand in cash over $51,000.00. I would say that as of December 31, 1929, the Stores Company did have approximately $51,000.00 in cash on hand. On or about the 31st day of December, 1929, the Stores Company had accounts receivable in the amount of $70,974.05. If that is on the statement, Government's Exhibit 40 for identification, it is true. I knew of my own knowledge that on December 31, 1929, the [240] company had inventories carried at cost of more than $250,000.00, and that they had fixed investments of over $145,000.00. I also knew that the company had on hand as assets unpaid subscriptions for its capital stock in the sum of better than $200,000.00, and that the company on that date had

(Testimony of Tom H. Brandt.)

a total net worth of better than $875,000.00, and a surplus of $33,780.00. The dividends were paid right after the first of the year 1930. The conversation was held some two or three weeks before we paid the dividends. I pre*ap*red a statement of the financial condition of the company as of the 31st of December, 1929, and delivered it to Mr. Sanders. I showed Mr. Gus Greenbaum a copy of this statement and gave him several mimeographed copies. I would not say that I knew this financial statement was to be inserted in the minute books of the company. The financial statement, Government's Exhibit 40 for identification, is the same as the financial statement shown on Page 9 of Government's Exhibit 22, which is one of the minute books of the company. I made up two statements as of December 31, 1929. One was partially mimeographed and there was an accounting error on it which we had to reconstruct. That is why I am confused on the two statements. As to whether this is the correct one, or the other is the correct one, I don't know. There is only a slight difference, however, of two or three thousand dollars in surplus. I delivered to Mr. A. E. Sanders the original of Government's Exhibit 40 for identification, which showed the Stores Company had total assets in excess of $1,000,000.00 as of December 31, 1929, and that is true. The source of the assets were three: (1) From the sale of stock; (2) From revenues on the sale of groceries; and (3)

(Testimony of Tom H. Brandt.)

From the issuance of common stock for concessions. [241]

Mr. Gus Greenbaum had nothing whatsoever to do with the preparation of this statement, Government's Exhibit 40 for identification, which is also shown on Page 9 of Government's 22 in Evidence. He had nothing whatsoever to do with the entries on the books of the Stores Company. After the financial statement of December 31, 1929, was prepared it was handed to Mr. Gus Greenbaum as a true and correct statement of the financial condition of the company. Mr. William Greenbaum or Mr. Charles Greenbaum had nothing whatsoever to do with the preparation of that statement; nor did they have anything whatsoever to do with the books and records of the Stores Company, nor with the entries in such books and records.

RE-DIRECT EXAMINATION.

I have discussed the affairs of the Stores Company with Gus Greenbaum and occasionally received instructions pertaining to the financial department. Mr. Sanders concentrated on the grocery end of the business, and Gus Greenbaum handled the financial end or stock selling end of it, and the detail matters that entered into our books and correspondence I looked to Gus Greenbaum as sort of a manager of that phase of it. Mr. Sanders didn't have much to do with the financial part of it. I wouldn't say that any of the copies of Gov-

(Testimony of Tom H. Brandt.)

ernment's Exhibit 40 for identification were mailed out to the stockholders. It was mailed to the various commercial houses from whom we were buying groceries.

Thereupon Government's Exhibit 40 for identification was admitted in evidence, without objection, as Government's Exhibit 40, which is as follows: [242]

UNITED CLARENCE SAUNDERS STORES, INC.
ARIZONA—NEW MEXICO
FINANCIAL STATEMENT
December 31, 1929
ASSETS

Current Assets		
Cash	$ 51,326.72	
Accounts Receivable	70,974.05	
Inventories (at cost)	251,400.93	
Total Current Assets	$373,701.70	$ 373,701.70
Investments & Securities		113,100.01
Fixed Property Investments		
Fixtures & Equipment	$147,743.79	
Automobiles & Equipment	8,939.98	
	156,683.77	
20% Less: Reserve for Depreciation	31,336.75	
	125,437.02	125,347.02
Deferred Charges:		
Unexpired Insurance	$ 2,042.06	
Prepaid Rents and Location Sites	8,497.50	
Organization and Development	35,000.00	
	45,539.56	45,539.56
Other Assets:		
Concessions	$151,000.00	
Stock Subscription Contracts	202,889.15	
	353,889.15	353,889.15
Total Assets		$1,011,577.44

(Testimony of Tom H. Brandt.)

LIABILITIES

Current Liabilities			
Accounts Payable		$ 62,906.22	
Trade Acceptances		4,885.88	
Accrued Payroll		2,904.95	
Accrued Expenses (Current)		46,761.28	
Total Current Liabilities		$117,458.33	$ 117,458.33
Fixed Liabilities			
Purchase contracts payable		9,182.38	9,182.38
Reserves			746.27

[243]

Net Worth			
Capital Stock:			
Issued & Outstanding:			
Preferred, 8% Cumulative	$462,000.00		
Common, No Par Value, 216,587 Shares	10.00		
Total Outstanding	462,010.00		
Subscribed—Not Issued:			
Preferred, 8% Cumulative	388,400.00		
Common, No Par Value, 23,725 Shares	.....		
Total Subscriptions	388,400.00		
Total Capital Stock	850,410.00	$850,410.00	
Surplus		33,780.46	
Total Net Worth		884,190.46	884,190.46
Total Liabilities & Net Worth			$1,011.577.44

The witness resumed: The surplus of $33,780.00 is made up, really, of two accounts: Capital Surplus and Earned Surplus, and this figure reflects both. I could not determine from this statement whether or not that surplus is a capital surplus or not.

"Q. Do you know of your own knowledge at that time from the condition of the company,

(Testimony of Tom H. Brandt.)

whether or not the surplus was a capital surplus?

Mr. REIN: Object to that as not the best evidence.

The COURT: Overruled.

Mr. REIN: Exception.

A. It shows a capital surplus, yes sir."

EXAMINATION BY THE COURT

I could only determine whether any net profit is reflected in that statement by referring back to the general ledger which would show it in detail. There was a net loss at the time the statement was made up. The $96,000.00 loss was in [244] June 1930. At the time of the discussion with Mr. Sanders in December 1929, the operating statement showed a loss of approximately $150,000.00 for the year 1929.

RE-DIRECT EXAMINATION

Referring to the $151,000.00 item entitled "concessions" that was for the Clarence Saunders franchise which was transferred by A. E. Sanders to the Stores Company. The common stock was carried on the liability side at $10.00 and this franchise or concession on the asset side at $151,000.00.

RE-CROSS EXAMINATION

This 151,000 shares of stock is the same stock which was authorized to be issued to Mr. A. E. Sanders by the Arizona Corporation Commission. Mr. Gus Greenbaum had nothing to do with the authorizing of the 151,000 shares to Mr. A. E. San-

(Testimony of Tom H. Brandt.)

ders. The Cash-Way Stores option is entirely different from this transaction. The contract for the Cash-Way Stores was never used. That had nothing to do with the license agreement between Clarence Saunders and A. E. Sanders. When the second divident was paid at the end of June 1930 the sale of stock had practically ceased.

"Q. At that time the Greenbaums and the Bond and Mortgage Company were making practically no effort to sell further stock, isn't that right?

Mr. FLYNN: Object to that as calling for a conclusion.

The COURT: Objection sustained.

Mr. REIN: Exception."

The Bond and Mortgage Company and the Greenbaum Brothers changed from selling stock to the selling of debentures in the early part of '30. I don't know when they stopped selling stock or debentures, but there was very little [245] activity after June 1930. The big volume of the sale of stock made by Greenbaum Brothers and the Bond and Mortgage Corporation was prior to the statement of June 1930.

Whereupon

MARGARET ROMLEY,

re-called as a witness for the Government, testified:

(Testimony of Margaret Romley.)

The witness identified Government's Exhibits 41-C and 41-D for identification, and stated that she had seen letters similar to these mailed while she was an employee of Greenbaum Brothers or the Bond and Mortgage Corporation. The letters were admitted in evidence as Government's Exhibits 83 and 84, respectively, which abstracted to the issue are as follows:

EXHIBIT 83

Form letter to stockholders from Financial Department of Arizona Clarence Saunders Stores, Inc., dated August 29, 1929, mimeographed signature of A. E. Sanders. States the various stores are rapidly nearing completion and that some stores have opened on certain dates, and that more than 1,100 people had purchased securities of the company and that each one of them was a satisfied purchaser; that "our common stock is now being sold at $7.50 per share, this raise being justified by the very satisfactory condition of the company, which has really exceeded our expectations."

EXHIBIT 84

Form letter to stockholders from Financial Department of Arizona Clarence Saunders Stores, Inc., dated September 16, 1929, mimeographed signature of A. E. Sanders. This letter expresses enthusiasm of President of what he saw on September 7th at the opening of the

(Testimony of Margaret Romley.)

Clarence Saunders Stores in Los Angeles, and states that the stockholders are naturally interested to know of the progress that the Clarence Saunders Stores are making, not only in Arizona but in other sections of the United States; that "the opening of the Clarence Saunders Stores in Los Angeles was by far the greatest opening that was ever held in the whole world. Over 110,000 people actually made purchases in the Clarence Saunders Stores that day, and over 300,000 people visited the stores at the opening. Mr. Clarence Saunders, who came by airplane from Memphis, was overwhelmed at the representation [246] these stores received. It was a world beater, both for attendance and sales, and the writer is informed by the newspaper staff that the opening of the Clarence Saunders stores had only one other rival in California this year in creating excitement, and that was the Graf*f* Zeppelin, which stopped there on its trip around the world.

"There are now over 1,200 Arizonans who have made investments in the Arizona Clarence Saunders Stores, * * *. In my last letter to you I stated that I had an announcement to make soon*n*that would be of prime importance to you. As it is customary with successful corporations to issue certain rights from time to time, the Board of Directors of your company

(Testimony of Margaret Romley.)

has decided to issue to the stock holders an allotment certificate, which will be explained to you in the next letter. This letter will come to you by registered mail with the allotment certificate enclosed. As President of this corporation, I advise you to take advantage of this opportunity as it will mean a great saving to you."

The Greenbaum defendants duly objected to the receiving of said exhibits in evidence on the ground that they were hearsay as to the Greenbaums, and for the further reason that there was not sufficient proof of mailing, but the Court overruled said objection, to which ruling counsel for the defendants Greenbaum then and there duly excepted.

Whereupon

SAM. W. HAMILTON,

called as a witness on behalf of the Government, testified:

I reside at Phoenix, Arizona, and I am by occupation a salesman for the Manufacturing Stationers, and was so occupied during the years 1929 and 1930. I believe I had some business dealings with Gus Greenbaum during that time. I called on him for the purpose of soliciting business in the line of printing and engraving. I took an order for print-

(Testimony of Sam. W. Hamilton.)

ing some letter heads and envelopes, and some bonds.

Thereupon Government's Exhibits 85 and 86 were received in evidence, which abstracted to the issue are as follows: [247]

EXHIBIT 85

Blank letter head of Arizona Clarence Saunders Stores, Inc., 701 Security Building, Phoenix, Arizona, and in the upper left hand has the printed words "Financial Department."

Attached to this letter head as part of this exhibit is an envelope, in the upper left hand corner of which appears: "Arizona Clarence Saunders Stores, Inc., 700-701 Security Building, Phoenix, Arizona."

On the blank letter head appears the following pencil notation:

"Or: 5/31/29
Del. 6/4/29/
2 M L H
1 M 10 Env."

EXHIBIT 86

Blank letter head of the Bond and Mortgage Corporation, Security Building, Phoenix, Arizona, with the following pencil notation thereon:

(Testimony of Sam. W. Hamilton.)

"B & M Corp
Ord. 11-25-29
Del. 12-20-29
1 M #10 Env
1 M L H"

The witness resumed: Exhibits 83 and 84 in evidence are identical with stationery furnished by my company. Exhibit 87 for identification is a sample of debenture printed for and delivered to the Bond and Mortgage Corporation, was received in evidence, which abstracted to the issue, is as follows:

> Specimen form of $1,000.00 first 8% Serial Gold Debenture of United Clarence Saunders Stores, Inc. Principal due January 1, 1940. Interest payable on the first days of January and July of each year. Principal and interest payable at the Phoenix National Bank of Phoenix, Arizona. This specimen debenture has twenty $40.00 coupons attached, and is negotiable unless registered.
>
> Note: This debenture is not secured and states on its face that it is one of an issue limited to the principal sum of $1,000,000.00.

[248]

CROSS EXAMINATION

Exhibit 85, which is a Saunders Company letter head was probably prepared a year before the Bond and Mortgage Corporation letter head, introduced

(Testimony of Sam. W. Hamilton.)

as Exhibit 86. Exhibit 85 and Exhibit 86 were ordered at different times. The bonds were printed by the Jeffries Bank Note Company of Los Angeles, but were delivered by us to the Bond and Mortgage Corporation about the 25th of April, 1930. I don't know whether payment was made to our company or direct to the Jeffries Bank Note Company. I didn't make the delivery myself, nor did I make the memorandum on the back of the envelope at which I am looking. Of my own knowledge I don't know whether the notations I am reading from are correct or not. My entire testimony is based on the notations made here, at least with reference to the preparation of these bonds.

Whereupon

A. E. SANDERS

called as a witness on behalf of the Government, testified:

I reside in Nogales, Arizona, and have resided there for a little over twelve years, where I have been in the grocery business. I know Gus, Charles and William Greenbaum and have know them since the latter part of 1927 or the early part of 1928. I met them first in the Piggly Wiggly store at Nogales. I was operating that store and they came down to sell an issue of stock in the Piggly-Wiggly. (This is "Piggly-Wiggly Southwestern Co." and is

(Testimony of A. E. Sanders.)

not to be confounded with "Piggly-Wiggly Holding Corporation of Yuma", an H. D. Sanders enterprise.) They were engaged in selling that stock until the latter part of 1928. After the issue was sold in the Piggly-Wiggly I had some further business dealings with them. In the latter part of 1928 before the Clarence Saunders Stores had been incorporated I had a conference with Will [249] Greenbaum in which he asked me if I thought we could get a concession from Clarence Saunders and I told him I didn't know whether I could or not and I either 'phoned or wired Clarence Saunders in Memphis, Tennessee. The matter was discussed with the Greenbaum brothers, Charles, Gus and William, several times in Nogales. After taking to Mr. Saunders in Memphis he either wired me or 'phoned me to come to Memphis, and I went there with Will Greenbaum. Mr. Greenbaum and I had an interview with Mr. Saunders in Memphis and I secured a franchise for Arizona and New Mexico outside of Dona Ana and Eddy Counties, New Mexico, for which franchise I paid $2,000.00 to Clarence Saunders, and then came on back to Nogales. I organized the Clarence Saunders Stores, Inc. I went to my attorney, Duane Bird's office and there was something said about preorganization stock to Mr. Bird by Mr. Gus Greenbaum and I am not sure whether Will or Charles were present at that interview or not. I believe now it was Will Greenbaum that spoke about the preorganization

(Testimony of A. E. Sanders.)

stock. I can't recall the exact words of the conversation, but Mr. Bird told them that if they wanted to do business that way they would have to get some other attorney, that he was representing me and not them. The Company was organized in Nogales by me. Mr. Duane Bird prepared the papers. I received 151,000 shares of the common no par value stock. I gave for that stock my concession with Clarence Saunders and an option on the Cash-Way Stores in Tucson that I had. The concession I mentioned was to operate Clarence Saunders Sole Owner of My Name Stores in Arizona and New Mexico, and the option was for five Cash-Way Stores in Tucson owned by Wheeler & Perry. That option was never exercised.

"Q. What did you do with that stock, that 151,000 [250] shares of stock?

To which question the Greenbaum defendants duly objected on the ground that it was not the best evidence as the stock transfer book would show, which objection was overruled by the Court and an exception duly taken.

I gave 20,000 shares of that 151,000 shares of stock to Greenbaum Brothers. There was no consideration for that transaction. I had some more of that stock; 35,000 shares were issued me, but that was all turned back into the company, in 1929 we gave the Greenbaums the contract to handle all the stock of the stores company for a twenty percent commission and they sold it in the com-

(Testimony of A. E. Sanders.)

pany's name in 1929. I never sold a share of stock; it was all sold by the three Greenbaum defendants. The Greenbaums had established offices in Phoenix and Tucson; their Phoenix office was in the Security Building. They sold stock as Greenbaum Brothers until the end of the year 1929. We, the Stores Company, handled all the collections. Most of the stock was sold on subscriptions calling for deferred payments, and we handled the collections at our office. The money the Greenbaums collected on the initial subscriptions was brought us, but after that all subscription letters and collection letters were sent out from our office, down on South Second Avenue. When I say "our office" I mean the office of Clarence Saunders Stores, Inc. The latter part of 1929 Gus Greenbaum came to me and said, "Sanders, it is a lot of trouble to make all of these collections, you have a girl busy on it all the time. We are going to organize a bonded mortgage company and we will handle all the stock of the company; we will sell it and handle the collections, and bring you down eighty percent of our collections and you will issue the stock, and that will be all you will have to do with it." They [251] started doing that on January 1st, 1930, and after that date I had nothing whatever to do with the collections. The Bond and Mortgage Corporation, I believe, functioned all during 1930. Government's Exhibit 79

(Testimony of A. E. Sanders.)

in evidence was the letterhead used by Greenbaum Brothers in the Security Building and it was not used at the stores. The signature of Government's Exhibit 79 in evidence is a rubber stamp facsimile of my signature. The rubber stamp was made for the use of Greenbaum Brothers and the Bond and Mortgage company as we had no use for it whatever at the store. That letter head, Government's Exhibit 79, was the letter head we used at the store and I think I furnished part of the information that went into that letter. Government's Exhibit 45 is a form letter that was sent out by the stores over my signature. The signature of Government's Exhibit 83 is not my signature, but I wrote it on there. The stencil signature "A. E. Sanders" appearing on Government's Exhibit 79 was never used by us at our stores in the promotion of the sale of stock. I knew the Greenbaums had the rubber stamp.

CROSS EXAMINATION

H. D. Sanders is in El Paso. I did not say that the Greenbaums were connected with our stores during the entire year 1930, but did say that the Bond and Mortgage Corporation was in operation during 1930, handling our stock. The Bond and Mortgage Corporation was not connected with our company at any time. I don't know what date they stopped selling stock, but it must have been the latter part of 1930. The name of the first corporation I testified about was Clarence Saunders Stores,

(Testimony of A. E. Sanders.)

Inc. That company was incorporated by me through my attorney, Duane Bird. None of the Greenbaums were incorporators of that company, nor were any of them either an officer [252] or director of that company. Each and every resolution was passed by the Board of Directors, and the Board managed the company; it was not in any way managed by the Greenbaums. When the application was made for qualifying the stock for sale it was handled by Duane Bird. I applied for the issuance of 151,000 shares of the common stock to me through my counsel, Duane Bird. He was not counsel for the Greenbaums. Prior to meeting the Greenbaums I was in business and desired to extend it. I cannot recall the exact conversation had with you (Mr. Rein), Mr. Bird and Mr. Whitney, and others, last Friday afternoon, but I do remember I said that as far as I was concerned there was no intention on my part, or on the part of anybody that was connected with me, to defraud the public, that I was sold a thousand percent on the Clarence Saunders Stores. I thought the business was going to be successful, and as far as I knew the Greenbaums thought so. Other than the 19,000 shares which I transferred to the Greenbaums I received $80.00 out of each $100.00 of money raised by them. I don't know exactly what I received, and would not know without going over the books. I should think it was over $800,000.00 in cash. The Greenbaums might have in some in-

(Testimony of A. E. Sanders.)

stances, I can't recall them right now, received part of that money other than the twenty percent which they were allowed by the Corporation Commission. The only instance I remember, we gave them $250.00 for traveling expenses. I am not positive of that though. I don't know when the Piggly-Wiggly Holding Corporation was organized, as I know nothing about it whatever, and have never been connected with it, neither do I know anything about the U-Save Holding Corporation, as I had no connection with it whatsoever. I don't think the Greenbaums had any connection whatever with these last two [253] mentioned companies. These companies were organized by my brother H. D. Sanders. The United Clarence Saunders Stores tried to effect a consolidation but I do not think it was ever consummated. I resigned from United Clarence Saunders Stores, Inc., as President, and I don't remember whether I was named a director or not. H. D. Sanders took my place as President of United Clarence Saunders Stores, Inc. I think I remained as General Manager. The first six months I drew $1.00 a year salary as President of Clarence Saunders Stores, Inc., and after that I drew $1,000.00 a month, and later a minute entry was made for $1,500.00 a month, but I was never credited with any $1,500.00 salary, nor did I receive it. I stated that I paid $2,000.00 for this Clarence Saunders franchise. I think personally I might have given Clarence Saunders more money, but

(Testimony of A. E. Sanders.)

there was never made a firm deal on it. I told him $2,000.00 was all I could afford to pay at that time, and the other money, he just let it go at that. There was never a definite agreement on it, he let me have the franchise and said if I could get it I could give it to him or not, and I paid him the $2,000.00 and that closed the deal. I don't know whether $8,000.00 additional was to be paid or not. I do not know anything about the removal of $100,000.00 worth of assets of United Clarence Saunders Stores, Inc., from Phoenix and taking it to Los Angeles. I do not know that $100,000.00 of merchandise was removed, and as far as I know the Greenbaums did not know of it. I don't know whether H. D. Sanders knew of it or not. I told Mr. Gus Greenbaum that my brother had figured on a consolidation and was taking the United Clarence Saunders Stores, Inc., over. I believe I told him that with my brother's wonderful personnel back of him the corporation [254] could continue on a profitable basis. After that time Gus Greenbaum was selling stock that belonged to him and not to the Company. He certainly never withheld any money from me that I was entitled to that I know of. He wasn't selling unissued stock at that time but was selling the stock that I gave him. It was not traded stock. The United Sanders Stores, Inc., was the last name of the company known as United Clarence Saunders Stores, Inc., The contract between United Sanders Stores, Inc., and the

(Testimony of A. E. Sanders.)

U-Save Holding Corporation was in November, 1930, but "I don't know anything about it, I don't think." I believe I was up in Kansas at that time.

Referring to Government's Exhibit 54, which is a notice to stockholders dated October 6, 1930, I believe I was instrumental in drafting that letter, it sounds like mine, although I don't remember all the exact wording. Anything in that letter I think is so. Those stores and warehouses were actually doing a volume of three and a half million dollars annually. They had assets of two million eight hundred thousand dollars. I would say that a very substantial part of those assets were contributed by the United Clarence Saunders Stores, Inc., (United Sanders Stores, Inc.) If it is stated in that letter that I would still be connected with the company that is true.

Will Greenbaum made one trip with me first to Memphis, Tennessee, and then Gus made a trip with me. "My best recollection was at first, maybe it might have been later, I don't know, that we visited Saunders there". There was no secret whatever about the rubber stamp that I have been interrogated about. I authorized the stamp as I couldn't spend all my time signing letters, and it was a perfectly open transaction. [255]

> "The COURT: Didn't you testify a moment ago you and Mr. Greenbaum went to see Mr. Saunders before the incorporation of your company?

(Testimony of A. E. Sanders.)

A. Yes, and I was just trying—when we got that franchise I am under the impression that Will Greenbaum went with me, there might be a possibility, I made another trip right shortly after back there and he might have gone with me on that trip.

Q. They were all made before the incorporation?

A. No, one trip was made after we incorporated the company.

Q. How long afterwards?

A. Two or three months afterwards.

Mr. REIN: Q. As his Honor sets forth, after the incorporation of the company?

A. I said it might have been, I am trying to place it."

During the year 1929, as President of Arizona Clarence Saunders, Inc., I made a single purchase of Del Monte products amounting to over $200,-000.00. We took a heavy inventory loss on that transaction. I do not know that any part of the merchandise went to the stores which H. D. Sanders was connected with. In October 1929 I placed an order, as President of the Arizona Clarence Saunders Stores, Inc., for over 4,000 pounds of coffee with the Duncan Coffee Company of Houstaon, Texas. We took *no* heavy inventory loss that transaction. I believe everyone in 1929 *too* heavy inventory losses no matter what they did.

(Testimony of A. E. Sanders.)

"Q. Was that part of the reason why this enterprise did not succeed?

A. No,—Well, it might have weakened the company a little on that loss. It is bound to weaken it some." [256]

I have been in the grocery business practically all of my life.

"Q. You believe that a chain of grocery stores on well located spots, a number of them could purchase more cheaply and sell more cheaply than an ordinary individual store?"

To which question the Government objected as calling for a conclusion on the ground that it was not proper cross examination. The Court sustained the objection on the ground that it was not [257] cross examination, to which ruling the Greenbaum defendants then and there duly excepted.

When the Stores Company was organized I immediately proceeded to do business, and determined upon locations to open up stores, and did open up stores. Up until the time I severed my connection with the company I think I opened up twenty-two or twenty-three stores, including the Piggly-Wiggly Stores. I think there were twenty-one Sanders stores.

"Q. Mr. Sanders, was there ever a word between you and Greenbaums, or any of them, that you and they or any of them would com-

(Testimony of A. E. Sanders.)

mit a fraud upon the public or any member of the public?

A. There was not.

Q. Can you recall any conversation at any time or place between yourself and the Greenbaums, or any of them, where any unlawful act was contemplated?

A. There never was as far as I know."

The Bond and Mortgage Corporation stopped, as far as I know, selling or offering for sale any of the capital stock or debentures owned by the company along in June or July 1930. At that time they stopped buying stock from the company. They might have come in some time later and got one or two debentures. I couldn't say definitely whether or not the sale of stock by the Bond and Mortgage Corporation, or by any of the Greenbaums, involving the purchase from the Arizona Clarence Saunders Stores, Inc. by the Greenbaums and the sale to the public had stopped by the end of July 1930, as I don't know.

Under the Clarence Saunders concession, or contract, I was required to buy fixtures of certain kinds from the Clarence Saunders Corporation. That corporation made suggestions as to a uniform method of exhibiting merchandise in the [258] stores. As I stated before they had a uniform class of fixtures. I used some of the advertising used by Clarence Saunders, but some I didn't. Outside of paying that corporation one-half of one percent royalty on

(Testimony of A. E. Sanders.)

the gross volume of the business they had nothing to do with our stores after they were established. They had suggestions and things like that, but they didn't send any supervisors out to our stores at all. They could do so if they wanted to, as we were supposed to keep clean and sanitary stores. Clarence Saunders himself never wrote me a letter until after I broke with him, that is, after we changed our name to United Sanders Stores, Inc. I don't think that he called my attention to the fact that I had broken the contract by not merchandising according to the uniform system prescribed by him. I never saw the letter dated January 1, 1931, which you now show me, which is addressed to the United Clarence Saunders Stores, Inc., and signed by Clarence Saunders Corporation, by Clarence Saunders, President. That letter was received after the name was changed to United Sanders Stores, Inc., and we had broken with Clarence Saunders at Memphis. The 35,000 shares of common stock of Clarence Saunders Stores, Inc., mentioned in the indictment were issued to me and were turned back to the company intact. None of that stock was given to the Greenbaums and they never had anything to do with it whatsoever.

RE-DIRECT EXAMINATION

On cross examination I testified that the Clarence Saunders Stores, Inc. got $80.00 out of each $100.00 of stock sold, but that is not entirely so. Out of

(Testimony of A. E. Sanders.)

each $100.00 they collected we would receive $80.00 if they sold the stock. If I said that I received $80.00 out of every $100.00 of stock [259] sold, I answered the question wrong, because a lot of the subscribers paid forty percent down and the Greenbaums got twenty percent of that, and if the subscriber didn't complete his subscription payments then the company only got twenty percent. Out of the first forty percent that was paid the Greenbaums got twenty percent as their commission. That would be fifty percent of the forty percent. I testified on cross-examination that after the first permit to sell stock in the Clarence Saunders Stores, Inc., I went to Baker & Whitney. The Greenbaums had established offices in Phoenix—it was our original intention not to leave the Tucson territory but they established offices in the Security Building and they praised Phoenix to the skies and they induced us to come over and open a store here. I went to Baker & Whitney of my own volition. Mr. Gus Greenbaum and I went to call on Mr. Whitney at the same time at the suggestion of Duane Bird. The first name of the Company was Clarence Saunders Stores, Inc., and it was successively changed to Arizona Clarence Saunders Stores, Inc.; United Clarence Saunders Stores, Inc.; and finally to United Sanders Stores, Inc.

RE-CROSS EXAMINATION

I don't think that the Bond and Mortgage Corporation and the Greenbaums had anything to do

(Testimony of A. E. Sanders.)

with the sale of any stock of the company after the name was changed to United Sanders Stores, Inc. I thought at the time that the twenty percent commission could be paid out of the first forty percent paid, but that wasn't so. I don't know what the unpaid subscriptions amounted to; nor whether nearly all subscriptions were paid in full, but I think most of them were paid in full. [260]

Whereupon

L. D. NULL,

called as a witness on behalf of the Government testified:

I am a public accountant, residing in Phoenix, Arizona, where I have resided for about seven years. I have been a public accountant for a little over ten years and I am a graduate of the University of California in Business Administration and Law, and have had two or three years experience with the Spreckles Company as one of their supervising accountants, and three years with the largest certified public accountant in California, and about three years with Lee & Garrett in Phoenix. The remaining time I have been in business for myself. I have made a detailed examination of the books and records of the Clarence Saunders Stores, Inc., and its successors in name. Looking at these books, Government's Exhibits 34 to 39 for identification, I will say they represent some of the books we examined on the date of the appointment of the

(Testimony of L. D. Null.)

receiver by the State Court. Government's Exhibit 39 for identification is the general ledger of this company under the different names from the inception of the company up to the date of the receivership on March 19, 1931. Government's Exhibit 35 for identification is the "cash receipt record" from the inception of the company to the latter part of 1930. There is another volume covering cash received, but this is one of the records we examined at the time. Government's exhibit 37 for identification is the journal register and one of the records that we examined, and covers the period of all transactions of the company from the inception to the close. I have examined Government's Exhibit 38 for identification, which is the register of the sale of the capital stock of the company from the beginning to the end. Government's Exhibit 36 for identification is the balance of the "cash received record", another one of the [261] volumes we examined. This covers the period from September 1930 to the date of the appointment of the receiver. Government's Exhibit 34 for identification is the "cash disbursed record", showing all monies expended from the beginning in January 1929 right up to the appointment of the receiver. There are many other volumes that we examined in the course of our audit that probably numbered hundreds of different sorts of documents and records. We examined the accounts receivable, the accounts payable register, all the stock registers, invoice reg-

(Testimony of L. D. Null.)

ister, sales register, any number of different volumes. We traced the books of original entry into the general record or the general register. That book, the second one from the bottom, we traced into the general ledger.

> "Q. Do you know whether or not these books that are here on the table are correct SUMMARIES of the original entry which you have examined?
>
> A. They are."

I spent some six months here in Phoenix examining the books at the warehouse of the company on Second Avenue. From my examination I am in a position to testify as to what the financial condition of the Clarence Saunders Stores, Inc., under its various names, was for the year ending 1929. I made a profit and loss statement for the year 1929, and have it here in my audit.

> "Q. What does that statement show?

(Objection to this question sustained).

The record shows that a document consisting of 207 pages, bearing the notation:

> "Canning, Wood & Null, Auditors, Income Tax Counselors, Ellis Building, Phoenix, Arizona" No. 34107-C, In the Superior Court of Maricopa County, Arizona, C. W. Messick, Plaintiff, v. United Clarence Saunders Stores, Inc., et al., [262] Defendants, entitled "Audi-

(Testimony of L. D. Null.)

tor's Tentative Report", which was submitted to counsel for the Greenbaum Defendants at 11:05 o'clock A. M., November 15, 1934. Whereupon the document was marked Government's Exhibit 88 for identification. At 11:10 o'clock A. M. this Court stood at recess until 2:00 o'clock P. M. on the same day. At 2:00 o'clock P. M. counsel for the Greenbaum defendants announced that they had not sufficient opportunity to examine the statement and compare it with the books, whereupon, after further discussion, the Court recessed until 10:00 o'clock A. M. November 16, 1934.

Whereupon the following proceedings were had:

The witness produced the statement above mentioned and resumed: That statement is a statement of the summary taken from all of the books of the Saunders Stores, Inc. It is a calculation—a resume of what transpired in the business as it is reported within the records and documents themselves. This particular statement includes receipts and expenditures and balances of the operating accounts. It is a matter that is subject to calculation.

Whereupon a statement of profit and loss for the year ending December 31, 1929, referred to by the witness, consisting of one page, was offered in evidence by the Government, and, Whereupon permission being first had and obtained the witness was examined on his voir dire.

(Testimony of L. D. Null.)

VOIR DIRE EXAMINATION

The report of which this profit and loss statement is a part is what we call a tentative report. The entire report was not prepared by me; it was prepared under both the supervision of my partner, Mr. Wood, and myself. Mr. Bradford also worked on the report, as also Mr. Ray. Mr. Brandt was employed three days on some special investigation that he had in mind that he wanted to disclose to us, and that was all his employment on the report. I worked on the report about 185 or 186 [263] days; Mr. Wood about 166 days; Mr. Bradford 159 days, and Mr. Ray 52 days. I examined all the books and records which underlie this profit and loss statement, and was familiar as far as possible with the underlying documents and data. There were some missing, very few. I was not obligated to reconstruct the records and books entirely; we did reconstruct some because the underlying documents such as files, etc. were not available. I would not say that my work was impeded to a considerable extent by the fact that there were missing records, but would say my work was complicated by missing records. Those missing records consisted of missing sales invoices, purchase invoices, cancelled checks, and missing accounts from the general ledger for the year 1929. The documents themselves eventually were made available. In order to check and verify the profit and loss statement offered in evidence a tremendous amount of work would be neces-

(Testimony of L. D. Null.)

sary; it would be necessary to go back and check sales records, purchase records and invoice records, and, I might say, hundreds of documents. You would not have to examine every one of the documents, I think you could go into them in a sort of test-check method. If you employed an accountant to make that one profit and loss statement I am referring to, it would take two or three weeks at least, and maybe longer. That would then amount to a test-check by an expert accountant. The supporting records for the profit and loss statement now offered in evidence would be the control records in the general ledger, the subsidiary ledger such as the cash received record, and cash disbursed records; those three books are here on the table. We would have the journal register which is on the table, but in order to go into the minute details of it we would have to have the invoice register, the itemized sales registers of the various stores in order to recapitulate into the total, and [264] then we would have to have perhaps some of the inventory sheets, so that we might check the closing inventory in sufficient manner to prove it accurately, and we would have to have some of the sales slips of the various stores. In the preparation of that profit and loss statement we examined the general ledger register and those other books I mentioned. We examined sales invoices, invoices rendered to the company; we checked the bank accounts, we checked the cancelled vouchers against the cash

(Testimony of L. D. Null.)

disbursed book itself, and reconciled the bank accounts through that method. We checked the cash receipts in comparison with the various bank statements over the period and against the sales reports from the various stores. We checked warehouse sales through the warehouse sales register, and we might have checked other records, but I am afraid I cannot recall all of them now. To examine the books and records which underlie the tendered profit and loss statement, I would say it took three men about four to six weeks. It would take one man about eighteen weeks. I don't think that it would take one man 18 weeks merely to examine the exhibits which are on the table in court here (Government's Exhibits 34 to 39 for identification). We examined many other books and records other than the exhibits which are here in court. In order to prepare the tendered exhibit correctly you would have to examine those other records which are not now here. I don't think that a single mistake in any book and record would make a material difference in the statement now tendered. It probably would not make over $100.00 difference in the net result.

To my knowledge the summary which we prepared of the books of the Sanders stores does not contain numerous errors. I now refer to the 250 page summary which was tendered the [265] Greenbaum defendants yesterday.

(Testimony of L. D. Null.)

(Thereupon Government's Exhibit 89 was marked for identification, being one page of the 250 page summary heretofore referred to).

I would think that Government's Exhibit 89 for identification is true and correct in its entirety. I wouldn't say that there are several items in that statement which do not coincide with the book entries of the stores corporation because this is a matter of interpretation. I might draw one conclusion and you another. That is not true of my entire audit. To my way of thinking the entire summary is correct in its entirety. In the Civil suit you mention I furnished a tentative schedule to the attorneys upon which to base their complaint and they filed the suit before we were able to recheck the data. The basic books, records and memorandum which underlie that financial statement are not in court, and since the trial opened they have not been in court, that is, not all of them.

Thereupon the document marked Government's Exhibit 89 for identification, being the financial statement referred to, was offered and received in evidence as Government's Exhibit 89, which is as follows:

(Testimony of L. D. Null.)

"UNITED SANDERS STORES, INC.

STATEMENT OF PROFIT AND LOSS		Year 1929
Grocery Sales	816,695.36	
Market Sales	179,709.22	
Gross Sales		996,404.58
Merchandise Purchased	1,103,646.32	
Less Inventory December 31, 1929	250,726.77	
Cost of Goods Sold		852,919.55
Gross Profit		143,485.03

[266]

Less Operating Expense:		
Salaries and Wages	105,955.15	
Store and Warehouse Rentals	34,388.66	
Taxes	1,594.66	
Compensation Insurance	1,348.02	
General Insurance	1,534.94	
Stationery & Postage	4,982.02	
Water, Power & Lights	6,495.51	
Laundry	2,715.23	
Telephone and Telegraph	1,945.94	
Advertising	16,984.81	
Repairs and Maintenance	2,154.84	
Professional Services	655.00	
Traveling Expense	7,031.78	
Subscriptions	546.15	
Delivery Costs	1,788.25	
Official Salaries	6,789.80	
Documentary Stamps	245.83	
Bags, Paper and Twine	3,235.01	
Auto Expense	1,152.37	
Unclassified Expense	43,859.67	
Cash Short and Over	683.06	
Depreciation	16,203.92	
		262,190.62
NET LOSS ON SALES		118,705.59
Plus Other Expense:		
Interest	3,473.61	
Unclassified Losses	1,531.42	
Loss on Bad Checks	811.97	
		5,816.90

(Testimony of L. D. Null.)

Less Miscellaneous Gains:

Earned Discount	9,315.75		
Unclassified Gains	6,321.32	15,637.07	9,820.17
Total Operating Loss			$108,885.42

Analysis of Surplus Account:

Operating Loss for 1929	108,885.42
Payment of Dividend on Preferred Stock	25,743.16
Amortization of Organization Expense	10,000.00
TOTAL SURPLUS DEFICIT	144,628.58

(Refer to Pages 10, 11, 12 and 13)" [267]

The Greenbaum defendants duly objected to the receiving of said exhibit in evidence upon the following grounds: That sufficient opportunity has not been accorded the Greenbaum defendants to examine the sources from which this profit and loss statement was made; that the books, records, data and memoranda that underlie this statement have not been introduced in evidence; that there has been no proper identification of the books and records that are in Court; that there has been no attempt to produce the people who made the entries, or anyone having personal knowledge of the facts, and there has been no showing that such persons are dead, or insane, or beyond the reach of the process of the Court, and that they are not available; and there is no underlying testimony as to the correctness or regularities of the entries from which this profit and loss statement was compiled; that the

(Testimony of L. D. Null.)

original entries are not in Court, and the books and records are shown to not be complete; that there is no showing that the Greenbaum defendants had anything whatsoever to do with the books and records which underlie the profit and loss statement, and that such profit and loss statement is pure hearsay as to each of the Greenbaum defendants; and that said profit and loss statement is not the best evidence; but the Court overruled said objection, to which ruling counsel for the Greenbaum defendants then and there duly excepted.

(Thereupon Government's Exhibit 89 in evidence was read to the Jury by counsel for the Government.)

Thereupon counsel for the Greenbaum defendants duly moved to strike Exhibit 89 from the files, and that the Court instruct the Jury that it was not binding upon the Greenbaum defendants upon the grounds previously stated in the objection to the introduction of the exhibit, but the Court denied said [268] motion, to which ruling the Greenbaum defendants then and there duly excepted.

DIRECT EXAMINATION, CONTINUED

The witness resumed: I have an instrument here which is the profit and loss statement for the nine months ending September 30, 1930, and also a balance sheet of the same date.

Thereupon the profit and loss statement was

(Testimony of L. D. Null.)
marked Exhibit 90 for identification, and the balance sheet Exhibit 91 for identification.

The witness resumed: The profit and loss statement for the month ending September 30, 1930, was compiled from the books of the Stores Company that are here on the table (Government's Exhibits 34 to 39 for identification). It contains a true statement of the profit and loss at that time in accordance with the records.

Thereupon the document marked Government's Exhibit 90 for identification was offered in evidence, but before being received the Court permitted counsel for the Greenbaum defendants to examine the witness upon his voir dire.

VOIR DIRE EXAMINATION

This Government Exhibit 90 for identification was prepared yesterday at the request of the United States Attorney. It was prepared from the records on the table there, and only those records. I would not assume that the books and records on the table are sufficient underlying data to make up a verified profit and loss statement from. In other words, in order to verify, I would say certify, to that statement as to its true and correct condition, those books are not sufficient. [269]

"The COURT: What Books?

A. Those books right there are not sufficient for me to go and verify every single item that is on Government's Exhibit 90 for identifica-

(Testimony of L. D. Null.)

tion. I would have to go back to cash disbursed and cash received and other fundamental and underlying documents before I could certify to it and say that it is absolutely true and correct in every instance.

I wouldn't say that every single entry would have to be examined in order to verify that statement because of this fact: We heretofore examined every underlying instrument and document and these entries appearing on the books were the entries we examined at the time from which that statement was taken. It is because of my previous acquaintance with the other books and records which are not here that I am able to prepare this tendered statement.

Mr. DOUGHERTY: I ask that the answer be stricken because he has already answered the question.

The COURT: It may be stricken.

Mr. DOUGHERTY: On the ground that the witness did not say what counsel put in his mouth or attempted to put in his mouth. He said that this profit and loss was compiled from those books on the table and these books on the table he has testified IS A SUMMARY of his examination of all the books.

The COURT: You don't mean that?

Mr. DOUGHERTY: These books ARE A SUMMARY, your Honor, of the original entry books.

(Testimony of L. D. Null.)

The COURT: Yes, read the question.

(The record was read by the reporter) [270]

The COURT: The answer may stand."

The witness resumed: I could prepare that statement from the general ledger that is on the table there because I have already examined those minute underlying documents and those entries. I could prepare it because I have already examined other books and records that are not in Court. The tendered exhibit, the profit and loss for nine months ending September 30, 1930, is based not only on the books which are now in Court but upon other records also. As I stated it would take one man at least three weeks to make an accurate check or verification of this profit and loss statement for the purpose of certifying to it.

An objection was made to the introduction of the document upon the grounds stated to the introduction of the previous Exhibit 89, and upon the further ground that counsel for the Greenbaum defendants did not see this statement until this morning, and the witness testified that it would take three weeks to verify it, and that the only reason that witness was able to prepare it was because of his familiarity with the books and records that are in Court and with the books and records that are not in Court.

Thereupon the following examination was made of the witness by the Court:

"The COURT: Why was it not submitted to counsel yesterday?

(Testimony of L. D. Null.)

A. It was not completed until twelve o'clock last night.

Q. How long had you been working on it?

A. Just before Court in the morning, and all afternoon and most of last night.

The COURT: Well, that is a very good reason why it was not submitted. [271]

Mr. REIN: It is hardly fair it seems to me to have an auditor who has worked on these books 153 days himself and his partner 189, and so on, to sit down and go over the work he has previously done and offer to the jury a profit and loss statement in two pages from books and records, some of which are not here and throw at us in the morning and say, we offer this as evidence as a proved fact.

Mr. DOUGHERTY: May I examine this witness a little further in this regard?

Mr. REIN: We still object to the introduction of the exhibit.

The COURT: I will reserve the ruling on the objection until Mr. Dougherty has completed his examination."

DIRECT EXAMINATION, CONTINUED

These books (Government's Exhibits 34 to 39 for identification) and the original entry books for the last year have been in the State Courts, some of them have been down at Chambers Warehouse for about two years, some of them have gone to No-

(Testimony of L. D. Null.)

gales, some of them are in California. They have been in my custody about five days before this trial began. Those books were all returned from California and Nogales many months ago. Those books marked for identification were all in the office of the Clerk of the Superior Court and had been practically all that time. I took this balance sheet directly from the books there on the table, and the information contained there, plus the information in my previous experience with the underlying records, is what went to make up this balance sheet. Those books which are not here were the records upon which the entries in this book were based. In the preparation of this report I did not go back to the original documents and entries that related to these particular transactions. This Balance sheet was made up strictly from the books that are identified here on the table. I would say that [272] the balance sheet was potentially accurate, but I would not say that I could certify to it or anything like that now without checking in more detail in order to be honest with myself. By potentially accurate I mean that there would only be a matter of a few dollars difference—two or three hundred dollars either way.

Thereupon the Government offered and there was received in evidence Profit and Loss Statement for the nine months ending September 30, 1930, which was marked Government's exhibit 90, which is as follows:

(Testimony of L. D. Null.)

"UNITED SANDERS STORES, INC.

PROFIT AND LOSS STATEMENT NINE MONTHS ENDED 9/30/30

Sales		
Retail Grocery	$1,029,675.94	
Retail Meats	293,921.72	
Wholesale	351,033.80	
Total Sales		$1,674,631.46
Cost of Sales		
Retail Grocery	842,076.42	
Retail Meats	223,654.48	
Wholesale	331,294.54	
Total Cost of Sales		1,397,025.44
Gross Profit from Sale		277,606.02
Expenses:		
Bags, Carton, Papers	8,310.14	
Salaries & Wages	176.839.93	
Rents	46,524.69	
Repairs & Supplies	6,450.53	
Laundry	3,588.76	
Royalties	6,512.85	
Heat, Light & Power	11,489.33	
Tel. & Tel.	3,225.23	
Miscl. Expense	1,104.50	
Advertising	19,876.13	
Auto. Exp.	3,592.73	
Stationery & Office Supplies	4,036.17	
Audit & Legal	2,521.18	
Taxes	9,273.79	
Insurance	6,124.74	
Bad Debts	116.54	
Dues & Subscriptions	1,362.20	
Travel	4,249.74	
Miscl. Administration	556.20	
Documentary Stamps	1,499.69	
Depreciation	14,917.50	
Total Expense		332,172.57

[273]

(Testimony of L. D. Null.)

Net Loss Before Other Income & Expense			$ 54,566.55
Other Income			
Interest	161.51		
Discount	8,492.75		
Freight & Delivery	460.32		
		9,114.58	
Other Expenses			
Cash Discount allowed	571.34		
Interest Paid Miscl.	2,196.55		
Interest Paid Bonds	2,917.15		
P & L Items	3,779.64		
Cash Short	1,128.54		
		10,593.22	1,478.64
Net Loss to Surplus			56,045.19
Profit & Loss Items			
Loss in Merchandise Inventory		5,678.65	
Miscl. Items		67.29	
		5,745.94	
Less: Sundry Credits		2,066.30	
		3,779.64."	

The Greenbaum defendants duly objected to the introduction of Government's Exhibit 90 in evidence, upon the following grounds: That sufficient opportunity has not been accorded the Greenbaum defendants to examine the sources from which this profit and loss statement was made, they having just now seen the statement for the first time; that there has been no proper identification of the books and records that are in Court; that there has been no attempt to produce the prople who made the entries, or anyone having personal knowledge of the

(Testimony of L. D. Null.)

facts, and that there has been no showing that such persons are beyond the reach of the process of the Court; that there is no underlying testimony as to the correctness or regularity of the entries from which this profit and loss statement was compiled; that the original entries are not in Court and the books and records are shown to be incomplete; that there is no showing that the Greenbaum defendants had [274] anything whatsoever to do with the books and records which underlie the profit and loss statement; and that such profit and loss statement is pure hearsay as to each of the Greenbaum defendants, and is not the best evidence; but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

At this juncture the Government offered the balance sheet in evidence and permitted further voir dire examination by the Greenbaum defendants.

VOIR DIRE EXAMINATION

As I stated, Government's proffered exhibit, the balance sheet of September 30, 1930, was prepared by me yesterday and the figures which it contains are found in the books which are now in Court. I could make it because I knew from a previous understanding of the case and the previous understanding of the books and records what the other books and records not in Court showed. The books and records now in Court would not be sufficient

(Testimony of L. D. Null.)

for anybody other than myself with my previous knowledge to certify to the balance sheet of September 30, 1930. It would take, as I stated, three weeks for one man to check Government's Exhibit 89 and this balance sheet of September 30, 1930.

"The COURT: Let me ask a question. Did you verify the accounts in the books here marked for identification from other documents and data that was available to you, data of the organization?

A. Yes, at the time that audit was made that was all done.

Q. You verified these items that are in these books?

A. Yes. [275]

Q. You have taken this profit and loss statement from the items in these books which has been previously verified?

A. Yes.

Mr. REIN: Q. But which books are not in Court now?

A. All of them are not in Court now.

The COURT: Do you offer it in evidence?

Mr. DOUGHERTY: Yes, your Honor."

Thereupon the document known as the Balance sheet of September 30, 1930, was offered and received in evidence as Government's Exhibit 91, of which the following is a photostatic copy: [276]

United Dandelion Flour Co.

Balance Sheet - September 30 1920

Assets			Liabilities & Net Worth w/ Capital		
Current Assets			Current Liabilities		
Cash	168681		Bank Overdraft	124563	
Govt + Empire Issues	722500		Piggly Wiggly Southwest Co	877470	
Accts Receivable	2565882		Accounts Payable	2839662	
Merchandise Inventory	2978345		Accrued Payroll	317800	
Stock Subscriptions Receivable	9165795		Notes Payable	1815677	
			Contracts "	320949	
Total Current Assets		4260203	Total Current Liabilities		7417190
Investments			Fixed Liabilities:		
Misc Stocks + Bonds	461729		Bonds + Debentures		15890000
United Dandelion Rebates Bonds	8000000				
Piggly Wiggly Southwest Co	1438800				
Total Investments		2849729	Total Liabilities		23307190
Fixed Assets			Capital and Surplus		
Fixtures + Equipment	1988926		Preferred Stock Issued + Outstanding	17700000	
Less: Allowance for Depreciation	3035598		Common " "	10501450	
Residual Value		16853328	Total Capital Stock	28201450	
Deferred Items			Deficit	2099374?	
Supplies on Hand	157959			2537847	
Prepaid Expenses	1695970				
Receivable Deposits	247116		Net Worth Dec 30 1920		26170976
Organization Expense	304488				10663603
Total Deferred Items		3256533			
Goodwill		15100000			
		24470793			18507189
					17997193

(Testimony of L. D. Null.)

The Greenbaum defendants duly objected to the receiving of said exhibit in evidence, upon the following grounds: That sufficient opportunity has not been accorded the Greenbaum defendants to examine the sources from which this balance sheet was made, they having just now seen the statement for the first time; that there has been no proper identification of the books and records that are in Court; that there has been no attempt to produce the people who made the entries, or anyone having personal knowledge of the facts, and that there has been no showing that such persons are beyond the reach of the process of the Court; that there is no underlying testimony as to the correctness or regularity of the entries from which this balance sheet was compiled; that the original entries are not in Court and the books and records are shown to be incomplete; that there is no showing that the Greenbaum defendants had anything whatsoever to do with the books and records which underlie the balance sheet; and that such balance sheet is pure hearsay as to each of the Greenbaum defendants, and is not the best evidence; but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

Thereupon, and after the exhibit was received in evidence, the Greenbaum defendants moved that it be stricken from the files and the jury instructed to disregard it, upon the same grounds as stated

(Testimony of L. D. Null.)

in the objection to its introduction, which motion was by the Court denied, to which ruling the Greenbaum defendants then and there duly excepted.

Thereupon Government's Exhibits 90 and 91 were read to the jury.

The witness resumed: Referring to Government's Exhibit 91, there appears under deferred assets, organization expense $304,644.88, and concessions of $151,000.00, of intan- [279] gible items, that is what you would call them, of no value whatsoever. Those are termed as assets.

> "Mr. DOUGHERTY: If those assets are taken out, what would be the total deficit at the time?

To which question counsel for the Greenbaum defendants duly objected upon the ground that the statement speaks for itself, but the Court overruled the objection, to which ruling the Greenbaum defendants then and there duly excepted.

Taking out organization expenses and concessions which are not recoverable assets and carrying them over to the deficit account you would have a deficit then of about $679,000.00. The balance sheet for 1930 includes the dividends of 1929 as well as the dividends of 1930. The balance sheet of 1930 includes all transactions of the company up to that date. In 1929 dividends in the amount of $25,743.16

(Testimony of L. D. Null.)

were paid and in 1930 dividends in the amount of $25,200.02 were paid, and they are both reflected in the deficit appearing in this balance sheet ending September 30, 1930. The total stock issued, common and preferred, from the inception of the organization until September 30, 1930, in dollars and cents amounts to $1,282,014.50. The corporation received approximately $800,000.0 in cash out of that. The commissions paid out of that were in the neighborhood of $205,000.00 from January 1st, 1929, to September 30th, 1930.

Thereupon the capital stock ledger was marked as Government's Exhibit 92 for identification.

The witness resumed: I have examined the capital stock ledger and I am thoroughly familiar with it. I saw that book at the general offices of the Stores Company shortly after the appointment of the first receiver. I examined the stock certificate stubs and the stock journal in preparing my report. I don't know where they are now, but I have searched [280] high and low for them but haven't been able to locate them. I made the search at the request of the United States Attorney's office.

> "Q. Calling your attention to this capital stock ledger again, did you vertify the entries in there with the original entries, the stubs?"

The Greenbaum defendants objected to this question upon the same grounds included in the ob-

(Testimony of L. D. Null.)

jection to Government's Exhibits 90 and 91, and upon the further grounds that the original records and stubs were hearsay as to the Greenbaum defendants, but the Court overruled said objection, to which said ruling the Greenbaum defendants then and there duly excepted.

I verified the entries in the capital stock ledger with the original records, the stubs and the stock journal.

CROSS EXAMINATION

Government's Exhibit 92 for identification was just brought into the Court room this afternoon before Court convened, and it was the first time that it has been in this Court. The balance sheet of September 30, 1930, purports to cover the entire transactions of the Stores Company from its inception to the date of the balance sheet. The item of fixtures and equipment in the amount of $198,899.26 included the automobiles belonging to the Company and the Packard automobile which the Company furnished to Mr. A. E. Sanders. I couldn't tell you what value that Packard automobile was carried at from this statement because I did not go back and analyze the fixtures and equipment account in detail. I do not know how many automobiles or trucks the Company had in addition to Mr. Sanders' Packard, nor do I know at what figure I carried any of those [281] items when I prepared Government's Exhibit 91, which is

(Testimony of L. D. Null.)

the balance sheet of September 30, 1930. I do not know the condition nor the re-sale value or actual market value of the rolling stock of the Company, that is the automobiles, which are reflected in this report as of September 30, 1930, and I wouldn't be qualified to answer that question. I never saw any of the items of the equipment that went into this report as I took it at book value which was the cost value. In preparing this balance sheet, Government's Exhibit 91, it was necessary for me to refer to the general audit made at the time of the appointment of the receiver in the State Court because that audit represents an examination in detail of all the records. It would not have been impossible to prepare this balance sheet, had I not made such audit. I could still prepare it. I would not vouch for the accuracy of that balance sheet in the absence of the missing books, and in the absence of my experience in the first audit. The items of concessions have no value. At the time that the 151,000 shares of stock were issued to Mr. A. E. Sanders by the order of the Corporation Commission no stock had been sold to the public and there was only outstanding the three original qualifying shares. Mr. A. E. Sanders transferred the franchise but I would not say from an accounting standpoint that the franchise was equal to the 151,000 shares which Mr. Sanders received. I don't think there was any resolution fixing the value of the franchise as far as the stock was concerned.

(Testimony of L. D. Null.)

I see no record of it in my audit because we copied the pertinent minutes.

If there was no paid-in capital and the stock was of no par value the franchise on the books would balance with the stock that the Company had given for it, and the books would not be in balance any other way, as that is a regular standard of bookkeeping procedure and exactly the way we would [282] set it up. I said that the franchise in question had no value whatsoever, but I couldn't answer the question as to whether or not the franchise did have a value at the time the original entry setting it up in the books was made. I would say that the franchise had no value on September 30, 1930. In the preparation of that balance sheet or statement, since the Company was no longer operating under the franchise, I would say that I prepared my statement on the theory the franchise was worthless because the Company was not operating under it. It had no recoverable value to the stockholders. I knew that the management of the United Sanders Stores had cancelled the franchise voluntarily, and that it was no longer existing as a present operating right, and naturally it would have no value as an asset. I am not sure but what the franchise might have been cancelled in 1931, a year later from the time I now fix. I cannot remember every minute transaction that I examined, as that would be impossible. At the time I made the audit

(Testimony of L. D. Null.)

I discovered the cancellation of the franchise to be a fact, but I don't remember the exact date, I would have to go back and refresh my memory on that. The fact that I remember that the Stores Company received about $800,000.00 in cash was because that is a simple matter to figure out.

In an operating, going concern such as the Sanders Stores a franchise concession has value when it is in use. If the franchise was owned by the Company I would say it would have some value, but I couldn't say a substantial value. I don't think the franchise was ever assigned. As to the value of the franchise I am afraid I could not answer, as I have already said, it had no value and I will have to stick to that. About twelve or fifteen thousand dollars in royalties were paid to Clarence Saunders under the franchise and I am sure he [283] accepted it. The franchise had a loss to that extent. I wouldn't say it had a value of $151,000.00 in my belief. I draw my conclusions from an audit of the Company and not from the transactions of the Company.

The profit and loss statement, Government's Exhibit 90, only covers from January 1, 1930, to September 30, 1930. The item of traveling expense on the profit and loss statement of $7,031.78 I vouch for as correct, but I could not give you the details without going into the books and records. The greater portion of it I believe was Mr. Sanders' traveling expenses. It would probably take me a

(Testimony of L. D. Null.)

day to go into the books and analyze them, and tell you who entailed those traveling expenses. The sources of my analysis would be limited to these books and records in Court. I can take it right from these but I could not find the supporting data or the original vouchers here in Court. The original entries are here now. Those are the original entries. In order to check the truth of the entries in those books anyone else but myself would have to examine the original records, but I have already done that so I can vouch for their truth. When I tell you that those underlying vouchers and records coincide with the book entries I am presuming to ask you to take my word for it. The insurance item of $6,124.74 appearing in the profit and loss statement for the nine months of 1930, I could not tell you whether it covered the personal life insurance of A. E. Sanders or not. Referring to pages 123 and 125 of the audit which is an account with A. E. Sanders, I don't think that is under the caption "insurance" in the general ledger. I cannot remember the details of every account without going back and doing a little checking. I prepared this September 30, 1930, statement last night as the result of my examination of a previous audit and I cannot now tell you whether Mr. A. E. Sanders' personal [284] insurance was carried in that item or not, at any rate I would consider that $6,000.00 of insurance a small transaction considering the transactions of the company, but would not

(Testimony of L. D. Null.)

consider it a minute detail. It has been so long ago that I cannot remember whether the company was beneficiary in those policies or not, but I don't believe so. There is also some A. E. Sanders life insurance reflected in the profit and loss statement for 1929. I don't know the amount nor the name of the company issuing the policies, nor who was the beneficiary. The item of February 15, 1929, showing a premium payment to the Missouri State Life Insurance Company by check No. 9 was charged to A. E. Sanders in our audit. We ascertained the ultimate facts about that insurance at the time we made the audit, but I cannot tell you about it now. I am not a certified public accountant. I spent about one-third of the total number of man days to prepare and complete this audit. I was not the auditor employed by the State Court to do this, my partner Mr. Wood was. I did not certify to the truth of the final audit because I didn't sign it. It was certified to by Mr. Wood. We auditors assign our work, and one of us did one part and another the other part. At the end of each audit Mr. Wood and I sat down and consulted as to what transpired during the day and checked each other's work, and at the completion of the work everything was fitted in daily. I checked his work, and he checked mine, and both of us checked Mr. Canning's work, as also the other auditors employed. The other auditors in turn did not check my work. We check each other's work as a

(Testimony of L. D. Null.)

matter of course, and it is necessary to check the original entries against the original underlying detail, as that is the only proper way to make an audit. In checking each other over we don't check everything in detail. Mr. Wood and myself [285] examined every record of the United Sanders Stores before we were through with the audit. We did not make exactly the same examination, but arrived at the same results.

There were sufficient missing records to require us to reconstruct some of the accounts from the source of original entry from which the general ledger is made. We found all the books of original entry. Exhibit 91 was made from books now in Court.

The cost of obtaining original capital is carried as a deferred asset and is carried under the caption "assets". This kind of an asset is usually amortized. I wrote off the $205,000.00 of commissions on the date of the receivership. I had nothing whatsoever to do with the books and records of the stores corporation at any time it was a going concern, or until it fell into the hands of the State Receiver. The only money this corporation has gotten was through the sale of stock and if the company had been efficiently managed with $800,000.00 in cash it might have operated with a profit. I don't mean to indicate to the jury that the payment of commissions for the sale of stock was wrong.

(Testimony of L. D. Null.)

At the time the company went into receivership there were only $7,609.25 worth of claims presented by the creditors. But according to the books and records as of March 19, 1931, when the receiver was appointed the general accounts payable were almost $19,000.00. The company had in operation 19 or 20 stores, and at that time had $5,600.00 in cash in the bank. Of this $19,000.00, it was not all immediately payable, some of it would probably be due in thirty days. I have never owned a grocery store or any other kind of a store. I suppose that if Sears-Roebuck was to enfranchise someone in Arizona to use its name it would be worth millions. The same might be true of Montgomery-Ward. Matters of that kind cannot be computed, but [286] I still say the Clarence Saunders franchise was worth nothing. That is my opinion. At the beginning of the company it might have been valuable to a certain extent, but not in the amount set forth in the books. As I stated the books of original entry are in Court, but the original documents back of the books of original entry are not in Court. I do not mean to say that all the books of original entry are in Court, there are probably one or two missing. The invoice register I know is not here. The accounts receivable is not here, but it is not a book of original entry but a subsidiary ledger. The accounts payable book is not here, but it is also not a book of original entry. A book of original entry is a book where the first permanent entry of a transaction

(Testimony of L. D. Null.)

is made. From an examination of these books and records that are now in Court, Government's exhibits 34 to 39 for identification, I could not certify to an audit based upon those books as they stand.

RE-DIRECT EXAMINATION

Mr. Wood and I received about $1,300.00 each for the audit which we made as that is all they could afford to pay us.

Whereupon the District Attorney asked permission to reopen the direct examination, which was granted.

The Greenbaum Brothers and Bond and Mortgage Corporation were to receive twenty percent of the total selling price of the stock. They were to receive their twenty percent upon the payment of forty percent. If they sold $100.00 of stock and $40.00 was paid down, the Greenbaum brothers received $20.00 right now, and if the subscription was not paid in full they still got the $20.00. [287]

CROSS EXAMINATION

If a subscriber purchased $100.00 worth of stock and paid $40.00 down the Greenbaum brothers kept $20.00 and the Sanders Stores got the other $20.00, and if the subscriber forfeited on his contract the Sanders Stores kept the $20.00 they received, and did not issue any stock, and the company was $20.00 ahead. There *wre* not so very many of these in-

(Testimony of L. D. Null.)

stances. According to the records the Bond and Mortgage Corporation sent into the general offices they paid their salesmen fifty percent of the commission the Greenbaums received. I am not postive but what it might have run five, ten or fifteen percent of the total sales in some instances, and that in some instances the Greenbaums only received five percent of the total commission.

TOM H. BRANDT,

recalled as a witness on behalf of the Government testified:

I started with the Stores Company September 15, 1929, and left the early part of August 1930. Prior to coming on the witness stand today I examined this book known as the capital stock ledger, Government's Exhibit 92 for identification. During the time I was connected with the company that book was under my supervision and control. In regard to the entries made therein during that time they are correct. This book was kept, while I was there, in the regular course of business of the company, and as one of its records. Referring to the letter you show me dated June 18, 1930, I saw the letter before in the office of the Stores Company on or about the date it bears. This letter emanated from the office of the Bond and Mortgage Company.

Thereupon the Government offered the letter in [288] evidence, and it was received and marked

(Testimony of Tom H. Brandt.)

Government's Exhibit 94 in evidence, which abstracted to the issue is as follows:

> Letter from Bond and Mortgage Corporation to United Clarence Saunders Stores, Inc., dated June 18, 1930, signed by M. Loveland, Assistant Secretary, instructing that certificate No. 965 for one share of preferred stock be transferred to Ethan Allen Whipple; to register debenture No. C-51 in the amount of $100.00 in the name of George Mutz; to transfer enclosed certificate No. 1343 for ten shares of common stock from Mrs. Minta Beebe to George Mutz; to issue 5 shares of common stock to Ethan Allen Whipple, and charge the certificate of the Bond and Mortgage Corporation on hand.

The witness resumed: Pursuant to the instructions in this letter, and upon its receipt, the Stores Company issued stock as a result of such letters as these, which letters were in effect orders or instructions to make certain issuances or certain transfers of stock. The stock was issued on the written order of the Bond *ad* Mortgage Corporation by means of communications such as this letter. This particular letter would call for the issuance of five shares of common stock to Ethan Allen Whipple, and that stock would be deducted or charged against the certificate which we had on hand belonging to the Bond and Mortgage Corporation. As I stated, this was in effect a transfer of stock belonging to the

(Testimony of Tom H. Brandt.)

Bond and Mortgage Corporation to Ethan Allen Whipple. The Stores Company received no money for that transfer or sale—it would just be a transfer of stock, no money involved in that transaction. While I was in charge down there we received the letter shown me dated June 17, 1930, under the same circumstances that I have just testified to in regard to the prior letter Government' Exhibit 94 in evidence.

Thereupon there was offered and received in evidence [289] the letter of June 17, 1930, being Government's Exhibit 93-B for identification, which was admitted in evidence as Government's Exhibit 95, which abstracted to the issue is as follows:

> Letter from Bond and Mortgage Corporation, dated June 17, 1930, addressed to United Clarence Saunders Stores, Inc., signed by M. Loveland, instructing that "it issue the following common stock certificates and deduct from the Bond and Mortgage certificate on hand". Then follow seven names, totalling 345 shares of the common stock. The letter further instructs "also please transfer the enclosed certificate to the Bond and Mortgage Corporation: Cert. No. 1333 issued to Mrs. Minta Beebe . . . 2-P".

The Greenbaum defendants objected to the admission of said letter in evidence upon the grounds that such letter was incompetent, irrelevant and immaterial in that it failed to prove or sustain any

(Testimony of Tom H. Brandt.)

of the material allegations of the indictment, but the Court overruled said objection, to which ruling counsel for the Greenbaum defendants then and there duly excepted.

The witness resumed: Examining Government's Exhibit 92 for identification, the Capital Stock Ledger, there is an entry in there that coincides with the order given in Government's Exhibit 95, and under the date of June 20, we issued certificate No. 1705 for 20 shares of common stock to William Bianconi.

Thereupon the Government offered a sheet from Government's Exhibit 92 for identification in evidence, which was duly objected to by the Greenbaum defendants and the Court thereupon undertook the examination of the witness.

EXAMINATION BY THE COURT

That transaction was during the time I was employed there and was under my supervision. I did not make the entries myself in my own handwriting, one of the clerks [290] under me made the entry under my supervision. These transactions were checked by me in detail, not only the cash accounting, but as to the correctness of the name, certificate numbers, and in fact the stock certificates themselves will bear my signature showing my approval.

Thereupon the sheet was offered and received in

(Testimony of Tom H. Brandt.)
evidence as Government's Exhibit 96, which abstracted to the issue is as follows:

> Account of William Bianconi in capital stock ledger, showing transfer of two shares of common stock on June 20, 1930, and August 5, 1930, totalling 60 shares, represented by certificates issued, Nos. 1705 and 1961.

The Greenbaum defendants duly objected to the introduction of said exhibit on the ground that there was no identification of the book such as required by law by the person who made the entry, and that there was no proof that the person who did make the entry is unavailable, and on the further ground that the exhibit is hearsay so far as the Greenbaum defendants are concerned, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

Thereupon there was offered and received in evidence the second entry on the ledger sheet in the name of the Bond and Mortgage Corporation, which counsel stipulated could be read into the record without waiving any rights to the other objections to it, which was read into the record as follows:

> "The entry is dated sixth month, twentieth day, journal folio 70, Certificate No. 23, number of shares 20".

The Greenbaum defendants duly objected to the receipt of said exhibit in evidence upon the ground

(Testimony of Tom H. Brandt.)

that it was incompetent, irrelevant and immaterial, and upon the ground that there was no proper foundation laid for its admission, and that upon [291] the further ground it was hearsay as to the Greenbaum defendants, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

Thereupon Government's Exhibit 95 was read to the Jury by counsel for the Government.

The witness resumed: This letter was turned over to our bookkeeper or stenographer, stock certificates were typed out showing the name and the amount of the shares and the numbers, the certificate numbe*r*s were inserted in the journals from which we posted into the capital stock ledger. An account was opened for each person buying stock, and all those certificates were issued as ordered here. To offset such issuances we made a counter entry charging against the Bond and Mortgage Corporation. The Stores Company received no consideration for that stock at that time.

Thereupon it was stipulated that the stock did not belong to the Stores Company but belonged to the Bond and Mortgage Corporation.

The witness resumed: The letter you show me dated July 1, 1930, was received under similar circumstances as the last two letters that I have identified and testified to, and came from the same source.

(Testimony of Tom H. Brandt.)

Thereupon the letter was offered and received in evidence as Government's Exhibit 97, which abstracted to the issue is as follows:

> Letter from Bond and Mortgage Corporation to United Clarence Saunders Stores, Inc., dated July 1, 1930, signed by M. Loveland, Assistant Secretary, instructing the company to issue 200 shares of common stock to Mrs. Leonora K. Smith, and deduct it from Bond and Mortgage certificate on hand.

The witness resumed: On or about the date of the letter there was a transfer of the stock mentioned therein by [292] the Bond and Mortgage Corporation in the amount of 200 shares of common stock to Leonora K. Smith. Insofar as the bookkeeping is concerned the same procedure was carried out at the time of this last transfer as I testified to in regard to the previous transfer of the last letter. Referring to the letter you show me dated July 2, 1930, I will say that that was received, while I was down there in the employ of the Stores Company, under the same circumstances as the prior letter and it came from the same cource.

Thereupon the letter was offered and received in evidence as Government's Exhibit 98, which abstracted to the issue is as follows:

> Letter from Bond and Mortgage Corporation, to United Clarence Saunders Stores, Inc., dated July 2, 1930, signed by M. Loveland, As-

(Testimony of Tom H. Brandt.)

sistant Secretary, instructing the company to issue 50 shares of common stock to J. E. Matteson, and deduct from Bond and Mortgage certificate on hand.

The Greenbaum defendants duly objected to the admitting of said exhibit in evidence upon the grounds previously stated, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

Whereupon the Court stated that in order to shorten the record without repeating the same objection all the time he would consider that the same objection would be made to each letter and that the same ruling would be made thereon, and the same exception noted and allowed.

Whereupon the Court stood at recess (November 16th, 1934, 5:00 o'clock P.M.) until 10:00 o'clock A. M. November 20th, 1934, and in recessing addressed defendants' counsel, and said in part: "We are going to recess until next Tuesday. That will give you an opportunity to examine those books."

Whereupon, on November 20th, 1934, the trial re- [293] sumed, and the following proceedings were had:

A letter of July 14, 1930, was marked as Government's Exhibit 93-F for identification.

The witness resumed: That letter was received by the Clarence Saunders Stores while I was in

(Testimony of Tom H. Brandt.)

charge of the office on or about the date it bears, and from the same source as the letters that I testified about Friday.

Thereupon the letter was offered and received in evidence as Government's Exhibit 99, which abstracted to the issue, is as follows:

> Letter from Bond and Mortgage Corporation to United Saunders Stores, Inc., dated July 14, 1930, signed by M. Loveland, Assistant Secretary, enclosing their check in the amount of $60.00 covering balance due on subscription of Franklin M. Green, with instruction to issue his certificates; also enclosing common stock certificates with instructions to issue as follows:
>
> Cert. No. 1792 for 25 common to Franklin M. Green
> Cert. No. 1750 for 200 common to Eva B. Pierce.
>
> Also instructing company to transfer the following preferred stock to Bond and Mortgage Corporation:
>
> Cert. No. 1013 for 2 shares preferred, issued to Franklin M. Green.
> Cert. No. 1014, for 3 shares preferred, issued to Franklin M. Green.
> Cert. No. 161 for 2 shares preferred, issued to Robert L. Morton.

The witness resumed: Pursuant to the request contained in the letter I credited $60.00 to the ac-

(Testimony of Tom H. Brandt.)

count of Franklin M. Green, and we issued new certificates for certificates 1792 and 1750 turned in. The Stores Company did not receive any monty consideration or payments for these certificates or for that transfer.

Thereupon a letter dated July 21, 1930, was marked Government's Exhibit 93-G for identification.

The witness resumed: That letter was received on [294] *on* about the date it bears by the Stores Company, and from the same source as the last letter I testified to.

Thereupon the letter was offered and received in evidence as Government's Exhibit 100, which abstracted to the issue is as follows:

> Letter from Bond and Mortgage Corporation to United Clarence Saunders Stores, Inc., dated July 21, 1930, signed by M. Loveland, Assistant Secretary, instructing the company to transfer Certificate No. 968 for 16 shares preferred to W. Nelson Mayer, and to transfer the following common stock from the certificates enclosed in the letter:
>
> W. Nelson Mayer — 8 shares
> Elizabeth Inman — 30 shares
> Mrs. John Freitag — 150 shares.

The Greenbaum defendants duly objected to the introduction of Government's Exhibit 100, upon

(Testimony of Tom H. Brandt.)

the grounds that it was incompetent and irrelevant, and did not tend to prove any offense charged in the indictment, the indictment charging that the stock they sold was out of the 35,000 shares, and the evidence affirmatively shows that no stock was ever sold out of those shares; and further there was no proper foundation laid for the introduction of this exhibit, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

The witness resumed: As an employee of the company I followed the instructions contained in that letter and made the transfers as requested.

Thereupon a letter dated July 22, 1930, was marked Government's Exhibit 93-H for identification.

The witness resumed: This last letter was received in the regular course of business on or about the date it bears, the same as the letters I have previously testified to. The letter was offered and received in evidence as Government's Exhibit 101, which abstracted to the issue is as follows:

[295]

> Letter from Bond and Mortgage Corporation to United Clarence Saunders Stores, Inc., dated July 22, 1930, signed by M. Loveland, Assistant Secretary, instructing the company to transfer 150 shares of common stock, represented by three certificates numbered 1767-68-69, to Catherine Ryan.

(Testimony of Tom H. Brandt.)

The Greenbaum defendants duly objected on the same grounds assigned to Exhibit 100, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

The witness resumed: Upon the receipt of this letter, as an employee of the company I made those transfers requested in that letter.

EXAMINATION BY THE COURT

Those were orders to transfer certain certificates of stock from shares of stock owned by the Bond and Mortgage Corporation. They had a certificate, or certificates—an aggregate number of shares from which they caused to be transferred certain other certificates to various purchasers. It was not an original sale by the Stores Company to these particular parties named, but merely a transfer. They were original sales from the Greenbaum Brothers to the purchasers. The certificate was originally given to the Greenbaums by A. E. Sanders and was a transfer of their stock to the parties named in the letter. The stock I refer to was common stock, not preferred.

DIRECT EXAMINATION, CONTINUED

Thereupon a letter dated July 23, 1930, was marked Government's Exhibit 93-I for identification.

The witness resumed: This last letter was received under circumstances similar to those I have

(Testimony of Tom H. Brandt.)
testified to in regard to the other letters. The letter was offered and re- [296] ceived in evidence as Government's Exhibit 102, which abstracted to the issue is as follows:

> Letter from Bond and Mortgage Corporation to United Clarence Saunders Stores, Inc., dated July 23, 1930, signed by M. Loveland, Assistant Secretary, enclosing Certificates 1748, 1812, 967, 966, 967, 963, 650 and 707, totalling 77 shares, to three purchasers.

The Greenbaum defendants duly objected to the introduction of said exhibit upon the grounds previously assigned, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

The witness resumed: I made the transfers requested in that letter.

Thereupon a letter dated July 26, 1930, was marked Government's Exhibit 93-J for identification.

The witness resumed: This last letter was also received on or about the date it bears, under circumstances similar to those that the other letters were received, and from the same source.

Thereupon there was offered and received in evidence the letter, marked Government's Exhibit 103, which abstracted to the issue is as follows:

(Testimony of Tom H. Brandt.)

Letter from Bond and Mortgage Corporation to United Clarence Saunders Stores, Inc., dated July 28, 1930, signed M. Loveland, Assistant Secretary, enclosing and authorizing transfer of the following certificates, totalling 310 shares of common stock, to four purchasers, certificates being numbered 1763, 1770, 1754 and 1755.

The same objection was duly made by counsel for the Greenbaum defendants, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

The witness resumed: Upon receipt of that letter the transfers were made.

Referring to Government's Exhibit 92 for identification, that is the account of the Bond and Mortgage Corporation [297] in the capital stock ledger, and shows the detail of the certificates issued to them and the certificates cancelled by them. The entries on the first six pages, up to the time I left the company in August 1930, were made by me or under my supervision and direction and are correct as to the transactions they purport to show.

Thereupon the nine pages were marked as Government's Exhibit 94 for identification.

CROSS EXAMINATION

In my statement to the Court I did not intend to say that the certificates referred to in the letters about which I have just testified were given to the

(Testimony of Tom H. Brandt.)

Greenbaum defendants or to the Bond and Mortgage Corporation for no consideration. I intended to say that they had certain certificates transferred from A. E. Sanders, which they held there and from which they drew certain shares of stock. These various transfers of stock are withdrawals from certificates previously issued to either Greenbaum Brothers or the Bond and Mortgage Corporation from A. E. Sanders' stock. I didn't mean to say that they were causing these transfers to be made to customers or themselves out of shares of stock to which they were not entitled. I wouldn't know whether they were entitled to them or not. "They were entitled to them in this respect—" I do not intend to say that the transferred shares mentioned in these letters were not paid for by the Greenbaums. As a matter of fact they were paid for. I have heard of a verbal contract, but I have never seen a written one, between A. E. Sanders and the Greenbaum defendants or the Bond and Mortgage Corporation whereby Mr. Sanders was to give them a certain number of shares of his personally owned stock after they had [298] sold so many shares of stock of the company. I left the employ of the company in the early part of August 1930, but I don't recall the exact date, but I believe the minute books will show it was August 7, 1930. I don't have any particular reasons, although I may have reasons, for remembering that date. I don't recall just now. I was not accused of anything by

(Testimony of Tom H. Brandt.)

Mr. Sanders on August 7th. I was accused of something on August 7th, by somebody, although after August 7th I had no further connection with the Stores Company by any of its names. As a matter of fact instead of resigning I was discharged.

At this juncture counsel for the Greenbaum defendants stated that they were waiting for Mr. Null to produce certain exhibits which he had gone after, and which were withdrawn from other files, and that they would desire to cross-examine this witness further. The Court announced that "you had better clear it up with what you have" and the defendants' counsel announced no further cross-examination.

G. C. PARTEE,

recalled as a witness on behalf of the Government, testified:

After Mr. Brandt left the employ of the company in August 1930, my duties after that time were that I was Secretary-Treasurer and had charge of the office. Referring to Government's Exhibit 93-K for identification, the letter dated November 4, 1930, I will say it was received by the company while I was employed there as Secretary. It was received from the Bond and Mortgage Corporation on or about the date it bears.

(Testimony of G. C. Partee.)

Thereupon the letter was offered and received in evidence as Government's Exhibit 105, which abstracted to the issue is as follows: [299]

> Letter from Bond and Mortgage Corporation to United Clarence Saunders Stores, Inc., dated November 4, 1930, signed by M. Loveland, Assistant Secretary, reading as follows:
>
> "Please transfer the enclosed certificate to Effie A. Curly, 315 W. Phoenix, Flagstaff, Arizona. Cert. 1930 . . . . . 100-C"

The Greenbaum defendants duly objected to the introduction of such letter in evidence upon the grounds that it did not tend to prove any offense charged in the indictment, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there excepted.

The witness resumed: I followed the instructions contained in that letter and made the transfer requested. The letter you show me dated November 10, 1930, was received on or about the date it bears, under circumstances similar to the prior letter I have mentioned.

Thereupon the letter was introduced in evidence as Government's Exhibit 106, which abstracted to the issue is as follows:

> Letter from Bond and Mortgage Corporation to United Clarence Saunders Stores, Inc., dated November 10, 1930, signed by M. Loveland, As-

(Testimony of G. C. Partee.)

sistant Secretary, enclosing certificates 1940, 1931, 1174 and 1418, authorizing the transfer to two purchasers; total certificates equal 160 shares common stock.

The Greenbaum defendants duly objected to the introduction of said letter upon the same grounds previously mentioned, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

The witness resumed: Upon the receipt of that letter I made the transfers requested.

Examining Government's Exhibit 104 for identification, those latter entries and figures in the last period appear to be my figures. All those entries from some time in August, when Brandt left the company, were made under my jurisdiction. The figures on the last three sheets are mine or were made [300] under my direction, and they correctly represent the transactions they purport to show.

Thereupon the Government offered and there was received in evidence Government's Exhibit 104 for identification, being part of Government's Exhibit 92 for identification as Government's Exhibit 104, which abstracted to the issue is as follows:

Account of Bond and Mortgage Corporation in capital stock ledger, consisting of 17 pages (contained in Government's Exhibit 92 for identification) showing cancellation and re-is-

(Testimony of G. C. Partee.)

suance of various certificates of common stock owned by Bond and Mortgage Corporation, between December 18, 1929, and February 14, 1931, being part of the stock transferred to it out of A. E. Sanders' 151,000 shares; also showing detail of certificates issued to it.

The Greenbaum defendants duly objected to the introduction of Exhibit 104 in evidence upon the ground that it was incompetent, irrelevant and immaterial, and does not prove or tend to prove any of the allegations of the indictment, and does not disclose any fact; and upon the further ground that the matter contained in said exhibit was hearsay as to the Greenbaum defendants, as there was no connection shown between the entries in this book and the Greenbaum defendants, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

The witness resumed: Referring to this capital stock ledger, there are two sheets, numbered 1 and 2, going back to May 24, 1929, that show the Greenbaum Brothers stock account.

Thereupon the two sheets mentioned, being part of Government's Exhibit 92 for identification, were marked Government's Exhibit 107 for identification.

The witness resumed: The entries on this exhibit 107 for identification, were not made by me.

(Testimony of G. C. Partee.)

The only entries made directly by me are the last three entries on the [301] last page. The entries prior to that were not made under my direction while I was in charge of the books. That was back beyond my time. The entries on this exhibit which were made by me are correct and show the transactions they purport to show.

CROSS EXAMINATION

In identifying the entries about which I have spoken, I have a knowledge of the action which was taken with reference to the letters and the transfer of the certificates. I have no knowledge of any transaction between the Bond and Mortgage Corporation and any certificate holder or purchaser. Offhand, I am unable to say from what source these certificates came but I can say that the certificates were issued to the Bond and Mortgage Corporation or Greenbaum Brothers, whichever the case might be, and that they were transferred, at least most of them were, from the Greenbaum brothers to the individuals named in the letters. The Bond and Mortgage Corporation or Greenbaum Brothers no doubt bought some of the certificates. I wouldn't know whether they actually paid for them and that the purpose of buying them was to support the market. I simply know that there were some transactions where stock was transferred from individual stockholders to the Greenbaum brothers and to the Bond and Mortgage Corporation, and

(Testimony of G. C. Partee.)

subsequently were transferred to other purchasers. I wouldn't say, without looking at the records, what was the last date on which the Bond and Mortgage Corporation sold any of the unissued stock of the Stores Company. I am sure they were not selling any of the unissued stock of the Stores Company after September 1930. I wouldn't have any way of correctly answering the question as to whether, in addition to the trans- [302] fers of stock which they had previously purchased and which stood in their name, that some of the transfers in Exhibit 107 represented sales of stock to customers long prior to the date shown in the ledger. I could not say when the sale of all of the stock took place without checking the records.

Under the contract between the Bond and Mortgage Corporation and the Stores Company the Bond and Mortgage Corporation purchased the stock from the Stores Company. They actually paid for the stock and delivered the money after they had been paid by their customers, although I do not have any independent recollection of that.

TOM H. BRANDT,

recalled as a witness on behalf of the Government, testified:

Referring to Government's Exhibit 107 for identification, the entries on the first page were made

(Testimony of Tom H. Brandt.)

by E. B. Horne, before my connection with the company, but those on the second and third pages were made by me. I have audited the figures on the first page and checked them with the records and other books of the company and they are correct. Mr. Horne was Secretary-Treasurer of the company at that time. The figures that were made by me or under my direction, which I have testified to, show the transactions which they purport to represent.

Thereupon the Government offered and there was received in evidence Government's Exhibit 107, which abstracted to the issue is as follows:

> Account of Greenbaum Brothers, 700 Security Building, Phoenix, Arizona, in capital stock ledger, showing various certificates of common stock cancelled and re-issued, between May 24, 1929, and November 18, 1929. The last item in this account, however, is dated June 30, 1930, whereby 200 shares were transferred to Bond and Mortgage Corporation, balancing [303] out the account; also showing stock issued to them out of A. E. Sanders' 151,000 shares.
>
> Notation: May 2, 1929—Cert. 272 for 3,850 shares were issued to the Greenbaum Brothers from A. E. Sanders' stock.
>
> December 12, 1929—Cert. 963 for 5,000 shares, and Cert. 962 for 500 shares, were issued

(Testimony of Tom H. Brandt.)

to the Greenbaum Brothers from A. E. Sanders' stock.

December 12, 1929—Cert. 965 for 2105 shares was issued to the Greenbaum Brothers from A. E. Sanders' stock.

June 30, 1930—JV-251—200 shares transferred to Bond and Mortgage Corporation, balancing out the account.

The Greenbaum defendants duly objected to the introduction in evidence of Government's Exhibit 107 upon the ground and for the reason that it was incompetent, irrelevant and immaterial, and did not tend to prove any offense charged in the indictment, and that the proper foundation had not been laid for its introduction, and it was hearsay as to the defendants and not binding upon them, but the Court overruled said objection, to which ruling the Greenbaum defendants then and there duly excepted.

The witness resumed: Exhibit 107 is the individual stock ledger sheet of Greenbaum Brothers. They started to cancel out on their certificates on May 24, 1929. That account represents the day the certificates were cancelled, the number of particular certificates cancelled, the number of shares cancelled, the certificate number issued, and the number of shares issued, and the balance of the shares as a result of the issuance to Greenbaum Brothers, less cancellations. The figures on the other exhibit,

(Testimony of Tom H. Brandt.)

which represents the Bond and Mortgage Corporation account, represent exactly the same thing. When the Greenbaum Brothers started to do business as the Bond and Mortgage Corporation the balance of the stock [304] was carried forward in the Bond and Mortgage Corporation account, balancing out the Greenbaum Brothers account.

When these certificates were transferred to the transferees named in these letters of instructions an entry was then made on the ledger sheet of the particular transferee, in this same book, that is, individual sheets were opened up as certificates were issued. This capital stock ledger (Government's Exhibit 92 for identification) represents the outstanding shares held by any individual, whether it was transferred or otherwise. The ledger reflects that these shares transferred from Greenbaum Brothers or the Bond and Mortgage Corporation were transfers of stock originally transferred to Greenbaum Brothers or the Bond and Mortgage Corporation by Mr. A. E. Sanders out of his personal stock.

CROSS EXAMINATION.

When I say that those were transfers out of the personal stock of A. E. Sanders I refer to the block of 151,000 shares issued to him pursuant to the permit of the Corporation Commission. I recall an instance where A. E. Sanders caused to be issued to himself a block of 34,500 or 35,000 shares

(Testimony of Tom H. Brandt.)
of stock separate and aside from this 151,000 share block. That 34,500 or 35,000 block of stock was issued in error and was cancelled out and Mr. Sanders no longer had the certificate for it or the shares. The Greenbaums received no part, and sold no part, of that particular certificate for 34,-500 or 35,000 shares. I know this of my own knowledge.

At this juncture counsel for the Greenbaums announced that as Mr. Brandt has been called and recalled back and forth, and if cross examination is resumed they would like to reserve further cross examination, to which suggestion the [305] Court said, "Yes, if you don't repeat."

The witness resumed: During all of the time I was in charge of the books of the Company I truly and accurately kept the accounts. The accounts were not in balance when I went with the company, but I caused them to be kept in balance until my tenure as comptroller expired. I recall that $5,-000.00 of the store money was checked out and a check made out in duplicate, the original check being made payable to the Phoenix Packing Company, and the duplicate, with voucher attached, showing United Clarence Saunders Stores with the explanation, on the duplicate, that it was advanced for the Kansas unit. That was a three-way deal; the advance was to the Phoenix Packing Company —they got the cash; the charge was against the

(Testimony of Tom H. Brandt.)

Kansas unit, with a reimbursement later from the Kansas unit. I did not as a matter of fact personally get the cash. This $5,000.00 was all checked out of the Stores account at one time in one check, around the 26th or 27th of June, 1930. It was checked out on a check signed by me, and I think that check bore a dual signature. It was drawn on the First National Bank of Arizona. I did not draw $2,000.00 in one check and $500.00 in another check out of the $5,000.00. I drew that money out of the Phoenix Packing Company account that had nothing to do with the Clarence Saunders Stores. This money which I withdrew came from the Sanders Stores. I didn't cause that withdrawal to be made from the Saunders Stores and the Packing Company account for a personal purpose of my own. $4,400.00 of that money was impounded at the Citizens State Bank under an order of the State Corporation Commission. I didn't deposit $2,000.00 of those funds in the Commercial National Bank in Phoenix. I stated $4,400.00 out of the $5,000.00 went down to the Citizens State Bank. There was only one check drawn against the $4,400.00 [306] and that was under the Corporation Commission's order. The $5,000.00 check drawn out of the First National Bank was deposited in the Valley Bank to the credit of the Phoenix Packing Company. The purpose of that withdrawal and its transfer to the Phoenix Packing Company was to impound the funds in the Citizens State Bank

(Testimony of Tom H. Brandt.)
under order of the Corporation Commission in the amount of $4,400.00. There was only one person authorized to check on that account. I did not check on the Commercial National Bank, as I had no Phoenix Packing Company account in that bank. I didn't say that I had taken some of the Phoenix Packing Company money which I got from Sanders Stores and put it to my own account, and I didn't do that.

Thereupon a document was marked Defendants' Exhibit "E" for identification.

The witness resumed: Looking at defendants' Exhibit "E" for identification, according to that I knew of a shortage of accounts at the Sanders Stores while I was comptroller. That is my signature appearing on the middle of Page 11 of that exhibit, and it was signed by me on or about the 11th day of August, 1930. I won't testify there was a shortage in the United Clarence Saunders Store account while I was its comptroller. I will testify to the statement a while ago that there was a three cornered deal to be repaid by the Kansas unit. In that I called it a shortage. It was not subsequently made good by the Kansas unit. It is not a fact that the shortage was my own personal shortage. I kept my own personal accounts at two banks, the Valley Bank and the Commercial Bank. None of these funds out of which I say the shortage arose found their way into my private

(Testimony of Tom H. Brandt.)

accounts. The Packing Company account was never straightened out. On this particular [307] $5,000.00 there is a contention there. I stated $4,400.00 of it was ordered escrowed by the Corporation Commission in the sale of the Phoenix Packing Company stock. We were required to retain twenty percent of that until the stock was issued. Under their orders we placed it in the Citizens State Bank. Under the promise of A. E. Sanders in Kansas to get funds here I made a fictitious entry and I showed it as a check to the Phoenix Packing Company for $5,000.00, and on the duplicate voucher I showed a charge against the Kansas unit, and put $4,400.00 in the Citizens State Bank at Five Points, because on June 30th we had to make a return to the Corporation Commission on the sale of stock and it required that that money be put up there. That had nothing to do with the stores company except that the Greenbaums owned the Packers Securities Company and they were selling that issue of stock. That had nothing to do with it except that Sanders was President of the packing company. They were two entirely different corporations.

Thereupon Defendants' Exhibit "E" for identification was offered in evidence, and which abstracted to the issue is as follows:

STATEMENT OF TOM H. BRANDT—MADE ON AUGUST 11, 1930, COMMENCING AT 1:55 P. M. IN THE PRESENCE

(Testimony of Tom H. Brandt.)

OF A. E. SANDERS, GUS B. GREENBAUM, ALEXANDER B. BAKER, and EDWARD LAZAR, OF THE LAZAR SECRET SERVICE. STATEMENT TAKEN AND TRANSCRIBED BY CLAIRE GAGE.

This statement consists of eleven typewritten pages of legal cap, being questions and answers with reference to a shortage, and stating in effect that around the 1st of July, 1930, Brandt drew a $2,000.00 check on the Phoenix Packing Company, payable to himself, and another check of $500.00 payable to himself, and deposited the $2,000.00 check to his personal account in the Commercial National Bank of Phoenix, and the $500.00 check to his personal account in the Valley Bank at Phoenix. The statement contains, among others, the following questions and answers: [308]

"Q. What is the extent of that shortage?

A. May I answer you in a different way? The extent of the shortage was $5,000.00 taken from the United Clarence Saunders Stores and deposited to the account of the Phoenix Packing Company and from which I have checked out $2,500.00.

Q. To yourself?

A. Yes sir.

Q. How did you get that $5,000.00 out of the United Clarence Saunders Stores into the Phoenix Packing Company, by what means?

(Testimony of Tom H. Brandt.)

A. We make our checks up in duplicate, and the original check showed payable to the Phoenix Packing Company $5,000.00. The duplicate showed United Clarence Saunders Stores, and the explanation was 'advanced to the Kansas unit'. That was charged into the United Clarence Saunders Stores account as organization and development expenses.

Q. In how many transactions or checks did you take this $5,000.00.

A. One.

* * * * * * * *

Q. Then another check for traveling expenses appears on the 24th of July for $100.00?

A. No.

Q. You took that upon yourself?

A. Yes.

* * * * * * * *

Q. Can you make this money good, Tom?

A. I think so, I couldn't possibly do it all at one time." [309]

The Government objected to the introduction of the Defendants' Exhibit "E" for identification on the ground that it was improper cross examination, and immaterial, and did not tend to prove any defense, and that it was a collateral matter brought out on cross examination, and was not proper for testing the credibility of the witness, or for the purpose of impeaching him.

Thereupon the Court recessed the jury, and after

(Testimony of Tom H. Brandt.)

considerable argument in which counsel for the Greenbaum defendants insisted that the disputed exhibit for identification was admissable for the purpose of showing the incorrectness of the entries in the books (Government's Exhibits 34 to 39 for identification) and for the purpose of testing the credibility of the witness. Whereupon the Court further stood at recess until 2:00 o'clock of the same day.

Whereupon the following proceedings were had:

CROSS EXAMINATION, CONTINUED.

Whereupon four checks were marked Defendants' Exhibit "F" for identification.

I subsequently withdrew part of the $4,400.00 in the Citizens State Bank to the account of the Phoenix Packing Company for the purpose of paying Mr. Whitney $1,750.00 for professional services, paid under the order of the Corporation Commission. I withdrew no further part of that money. Looking at Defendants' Exhibit "F" for identification, consisting of four checks, I will say after examining them that they each bear my signature on their face and that they were drawn by me on or about the dates each of them bear, and they each bear my endorsement on the reverse side.

Thereupon the defendants offered in evidence [310] Defendants' Exhibit "F" marked for identification, of which the following is a photostatic copy: [311]

No. 41

PHOENIX PACKING COMPANY
Luhrs Tower

PAID

PHOENIX, ARIZONA 7-24 1930

PAY TO THE ORDER OF [illegible] $ 500 00

Five Hundred & [illegible] DOLLARS

TO THE VALLEY BANK,
PHOENIX, ARIZONA.

PHOENIX PACKING COMPANY
By [illegible]
Pres. Sec'y Treas.

91-2
12 LOS A

THE COMMERCIAL NATIONAL BANK
JUL 25 1930

PAID

No. 16

PHOENIX PACKING COMPANY
Luhrs Tower

PAID

PHOENIX, ARIZONA 7-1 1930

PAY TO THE ORDER OF [illegible] $ 500 00

Five Hundred & [illegible] DOLLARS

TO THE VALLEY BANK,
PHOENIX, ARIZONA.

PHOENIX PACKING COMPANY
[illegible]
Pres. Sec'y Treas.

91-2
12 LOS A

PAID

Exhibit No. 3
Marked for Identification only
JUN 30 1934
J. P. Hayes, Clerk
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
By [illegible] Deputy Clerk
Case No. E-41-Phx-Eq
Title [illegible] vs [illegible]

PAID

No. 42

PHOENIX PACKING COMPANY
Luhrs Tower

PHOENIX, ARIZONA 7-24 1930

PAY TO THE ORDER OF [illegible] $100.00

[illegible] DOLLARS

TO THE VALLEY BANK,
PHOENIX, ARIZONA.

PHOENIX PACKING COMPANY

By [signature] Pres. Sec'y Treas.

91-2
19 L09 A

[signature]

21-3
L-3P-30
W WD

PAID

No.

PHOENIX PACKING COMPANY
Luhrs Tower

PHOENIX, ARIZONA 7-2 1930

PAY TO THE ORDER OF [illegible] $1000.00

Two Thousand [illegible] DOLLARS

TO THE VALLEY BANK,
PHOENIX, ARIZONA.

PHOENIX PACKING COMPANY

By [signature] Pres. Sec'y Treas.

91-2
19 L09 A

[signature]

PAY ANY BANK OR BANKER
THE COMMERCIAL NATIONAL BANK

21-3
L-3P-30
W WD

(Testimony of Tom H. Brandt.)

The Government objected to the introduction of this exhibit on the grounds that it was immaterial and was not proper cross examination, and had nothing whatever to do with the issues involved in the case. Whereupon, after considerable colloquy between the Court and counsel, further examination of the witness was had.

The witness resumed: I recall a meeting in Phoenix, Arizona, on or about August 11, 1930, shortly after the noon hour, at which A. E. Sanders, Gus B. Greenbaum, Alexander B. Baker and Edward LaZar were present—I was also present at that meeting.

Thereupon the Jury retired from the Court Room and the following proceedings were had:

"The COURT: * * * This witness has testified that one of the entries in that book is fictitious. It strikes me that this satisfies your inquiry. Make your avowal.

Mr. HOWE: At this time the defendants Greenbaum, and each of them, avow that if permitted to do so by the Court, they would ask the witness Brandt the question heretofore objected to, which objection was sustained, and that in response to such question the witness Brandt would testify that at such conference and in the presence of the persons named, he did [315] state to them that there was a shortage of $5,000.00 in the account of the United Clarence Saunders Stores, and that he was responsible for the shortage, and that out of

(Testimony of Tom H. Brandt.)

the $5,000.00 by him taken from the United Clarence Saunders Stores, he had checked out the sum of $2,500.00 for his own personal use, in separate checks, and if asked how this shortage of funds from the Stores Corporation was effectuated or consummated, would testify in response thereto that checks of the Stores Company were made up in duplicate, and that the original check figuring in this transaction, that is, the check of $5,000.00 in its original form showed payable to the Phoenix Packing Company, but that the duplicate check showed United Clarence Saunders Stores, and that the explanation on the duplicate check was that the sum of $5,000.00 had been advanced to the Kansas unit, and that accordingly the books of account of the Sanders Stores here showed an entry or a charge of $5,000.00 as organization and development expense, when in truth and in fact such entry was false and was but a device to cover up the speculation or embezzlement of the witness Brandt. We avow that if permitted to ask the witness Brandt as to the time in which he took $5,000.00 of the Stores Company's money for his own personal use, he would state it was taken around about the 26th or 27th of June, 1930, in the form of check on the Saunders Stores, signed by himself, drawn upon the First National Bank of Phoenix, and that the withdrawal was charged against the Kansas unit to organization and development expenses. We will avow if permitted to ask the witness Brandt what

(Testimony of Tom H. Brandt.)

disposition was made by him of the money withdrawn from the Saunders Stores he would testify that he deposited $2,000.00 of that embezzled sum in the Commercial National Bank at Phoenix, and that he afterwards withdrew from the Commercial Bank from [316] time to time the sum in question, and that he subsequently deposited $1,000.00 of the funds so taken from the Stores Company to his personal account in the First National Bank, and that the money so taken by him through the scheme was used for his own personal use, and that it was covered up by a fictitious entry in the books of the company, and we avow further that it can be developed through this witness that many of the books and records of the company were kept by him at his own home, and not at the company office, for the purpose of concealing these transactions, which books and records are not now present in court.

Mr. FLYNN: We interpose an objection, your Honor, and object to the introduction of this evidence on cross examination in accordance with the avowal on the ground it is immaterial, not proper cross examination, that it involves collateral matters either not brought out at all on direct examination, or cross examination, or brought out on cross examination.

The COURT: I think the matter of keeping the books would be proper cross examination, Mr. Flynn.

(Testimony of Tom H. Brandt.)

Mr. FLYNN: I don't apprehend that we have to separate counsel's avowal?

The COURT: No, that is true.

Mr. FLYNN: We are objecting to the entire avowal.

The COURT: There is probably something in the avowal which is pertinent. I think there are other matters that are not. This is a case in which the Court feels it should be satisfied on the introduction of this testimony, and I will take a recess until I make a ruling on it. I may be a little confused because this witness has been called and recalled on many occasions, and counsel announced they [317] would reserve their cross examination at different times, and I am at sea as to what part of his testimony on cross examination was reserved. I will recess for a few minutes."

The jury was returned into Court, all jurors being present.

"The COURT: The objection to the avowal is sustained.

Mr. HOWE: Please note our exception.

The COURT: The reporter will note the exception. Proceed."

The witness resumed: The transaction with reference to the $5,000.00 item about which I have been interrogated was not the sole reason for my discharge, it was one of them.

(Testimony of Tom H. Brandt.)

At this juncture counsel for the Greenbaum defendants announced that it reserved the right to cross examine the witness if he is recalled. It was granted.

L. D. NULL,

recalled as a witness for re-cross examination, testified:

I stated the other day that there were only a few missing items or missing accounts in the books of the Clarence Saunders stores when they came to me for examination. I said Mr. Walter A. Wood is a partner of mine.

Thereupon Defendants' Exhibit "G" was marked for identification.

I have seen the original of the copy you show me, being an application for auditor's fees and Order to Show Cause. That was prepared and signed by my partner Mr. Wood.

Thereupon the Greenbaum defendants offered in evidence Defendants' Exhibit "G" for identification, which abstracted to the issue is as follows:

[318]

> Application for Auditor's Fees, and for Order to Show Cause, in No. 34107, entitled "C. W. Messick, Plaintiff, vs. United Clarence Saunders Stores, Inc., a corporation, et al, Defendants", pending in the Superior Court of Maricopa County, Arizona.

(Testimony of L. D. Null.)

Application signed by Walter A. Wood, which states in effect:

"That a large part of the books and records of said defendants were so incomplete that your Auditor was required, in order to reach a satisfactory and accurate conclusion, to rebuild many of the voluminous transactions carried by said defendants from extraneous material, which your auditor was obligated in many instances to discover; that in order to find and procure the extraneous material, to investigate, analyze and build up the same into the form as the same is contained in your auditor's report, your auditor was obliged to employ expert accountants and assistants, together with stenographers, to assist your auditor in obtaining, checking and verifying the figures and data contained in your auditor's report * * * "

The application further states that the following named persons worked for a number of days, as set forth opposite their respective names:

Walter A. Wood	183½ days
L. D. Null	173 days
Earl Canning	60½ days
E. C. Bradford	159 days
J. B. Ray	52 days

Prays for an allowance of $11,220.00, plus expenses incurred in the sum of $2,464.12. [319]

(Testimony of L. D. Null.)

The Government duly objected to the admission of said exhibit on the ground that it was immaterial and on the further ground that it was prepared and signed by someone who was not a witness in the case and that no opportunity was afforded the Government to cross examine him about the contents of it, and upon the further ground that it was not proper cross examination, and the court sustained said objection, to which ruling the Greenbaum defendants then and there duly excepted.

The witness resumed: After looking at this report by my partner Mr. Wood I will say there were a few missing matters of no great importance. It is not true that a large part of the books and records of the Stores were so incomplete that the auditors were required, in order to reach a satisfactory and accurate conclusion, to rebuild any voluminous transactions carried on by the corporation.

ROY N. DAVIDSON,

called as a witness on behalf of the Government, testified: [320]

I am Acting Collector of Internal Revenue for the District of Arizona, and have in my charge the records of the office of the Internal Revenue Department for that District. I have with me part of those records in regard to the income tax return of the Arizona Clarence Saunders Stores, or United

(Testimony of Roy N. Davidson.)

Sanders Stores, Inc., These records cover the years 1929 and '30.

"Mr. FLYNN: Will you produce them, please?

A. I will have to respectfully decline, Judge.

The COURT: You decline?

A. Here is my authority, your Honor (handing instructions to the Court)

The witness resumed: You ask me how I got that rule—I got it in the Sullivan case.

The COURT: These regulations don't seem to make any distinction. Of course, by the consent of the defendant in the case, I suppose they might be introduced. * * *

The COURT: You seem to be pretty well fortified with authority, Mr. Davidson, to support your position. (Addressing Mr. Flynn) Did I understand you to say they were introduced as evidence in the Sullivan case?

Mr. FLYNN: There were witnesses in the Sullivan case whose incomes were involved, not the defendants, but other witnesses and other corporations, where the taxpayer took the stand and waived his privilege, and the Judge presiding in those cases permitted the introduction of the returns."

The witness resumed: In our office the only records we have are merely a card record of the filing. We do not have the returns, they are in Washing-

(Testimony of Roy N. Davidson.)

ton. All returns of that class are sent to and kept in Washington. We have merely [321] a record of filing, by years, of corporations, showing their net income which we transcribe from the return. That record is kept in our office as long as the corporation is in existence.

Thereupon the Court stated that he was inclined to believe under the circumstances that with the consent of the president of the corporation that these cards could be admitted, but that the consent should be obtained before Mr. Davidson should be required to disclose any facts as to the records of his office.

The witness resumed: I have the records for 1929 of the Arizona Clarence Saunders Stores, and of 1930 for the United Sanders Stores, Inc.

Thereupon the witness was withdrawn from the witness stand.

A. E. SANDERS,

recalled as a witness on behalf of the Government, testified:

I was President of the Arizona Clarence Saunders Stores and its successors in name up until October 1930. I held after that, the office of General Manager of the company. Mr. H. D. Sanders became President on October 15, 1930. I was President all during the year 1929, and was connected with the

(Testimony of A. E. Sanders.)

company as General Manager after October 15, 1930. I don't know whether I was named as a Director or not.

"Mr. FLYNN: Have you any objection, or will you consent to the official of the Internal Revenue Office Collector of Internal Revenue for the State and District of Arizona, to testify in regard to the income tax return of the Arizona Clarence Saunders Stores, or its successors in name and interest for the years 1929 and 1930? [322]

Mr. WHITNEY: We object to that on the ground that Mr. Sanders is not now President of the company, no showing that he has any authority to grant that permission, and the fact that he was President in 1929 and part of 1930 would not give him the right now to waive on behalf of that corporation, or to waive any objection the corporation may have to the examining of those corporation records. That is the first objection. The second objection is that whatever those cards are, they are not binding on the defendants, and there has been no proof that this corporation has been actually dissolved. The fact of the matter is that it hasn't been dissolved.

The COURT: Where is it now, in the receivership?

Mr. WHITNEY: That is not a dissolution

(Testimony of A. E. Sanders.)

of a corporation. Your Honor has a couple in here that are very alive.

The COURT: I asked you if it is not in receivership.

Mr. WHITNEY: It is in receivership, yes, but that doesn't give him the authority as an officer of the corporation in 1929 to waive their right now to look at a tax return prior to that any more than it would give me the right if I was attorney for your Honor in 1929, and not attorney for you now, to step up and disclose confidential relations between us.

The COURT: The question is if he had any objection. This is personal.

Mr. REIN: Mr. Whitney's objection is that it don't make any difference whether he has or not.

The COURT: He may answer the question.

A. I haven't any objection. [323]

The COURT: That leaves us in another embarrassing position.

Mr. FLYNN: I think we are willing to concede that the consent of Mr. Sanders, not being President when the corporation went into the hands of the receiver, that we are in no better position than we were before, but we don't concede that the testimony of Mr. Davidson is not admissible at this time. I think it is admissible by reason of the fact that the corporation is in the hands of a receiver and that there is

(Testimony of A. E. Sanders.)

no one who has the authority to waive that for the reason it doesn't involve any going concern or any individual, the reason for the rule not being in existence, the rule should not apply.

The COURT: Well, I think that is probably true. You may enter an order, Mr. Clerk, a minute entry, that the Court directs Mr. Davidson, the Internal Revenue Collector of this District, to disclose the record. Take the Stand."

ROY M. DAVIDSON

resumed the witness stand:

"The COURT: The purpose of your offer is to show what?

Mr. FLYNN: All I have asked the witness now is to produce the records. I was going to have the witness either introduce them in the record or testify to them in order to avoid putting these Government records into evidence, to have him read the records into the evidence, * * * the Government is very anxious to investigate this question to satisfy ourselves and the Court that there is no error committed. We don't want to commit error in this case, and it might be advisable if it meets the Court's approval to recess until [324] morning, and we will either rest then or proceed with this testimony which will only take about five minutes.

The COURT: Very well. Bear in mind the

(Testimony of Roy M. Davidson.)

admonition, gentlemen. Recess until tomorrow morning at ten o'clock."

Whereupon,

ROY M. DAVIDSON,

on Wednesday, November 21st, 1934, at 10:00 o'clock A. M. resumed the witness stand for further direct examination, and testified:

I now have authority of the Department to testify in regard to the records as shown by my records of the United Sanders Stores, and the Arizona Clarence Saunders Stores. I received this telegram in reply to one that was sent to the Commissioner of Internal Revenue.

Thereupon the telegram was offered and received in evidence as Government's Exhibit 108, which abstracted to the issue is as follows:

> Postal telegram, dated November 21, 1934, from Washington, D. C., authorizing Acting Collector of Internal Revenue at Phoenix, Arizona to testify in this case with reference to income tax return of States Company for the years 1929 and 1930. Signed "Helvering Commr."

The Greenbaum defendants duly objected to the admission of said telegram in evidence upon the grounds that the proper foundation had not been laid for its introduction, and that it had not been

(Testimony of Roy M. Davidson.)

properly identified, and that the disclosing of the returns was in violation of Section 3167 of the Revised *States* of the United States, and that there was no showing that Helvering is the Commissioner of Internal Revenue, and if he is, there is no showing that he sent the telegram. But, the Court overruled said objections, to which ruling the defendants Greenbaum then and there duly excepted. [325]

The witness resumed: This instrument is one of the permanent records, kept in the regular order of business in my office and is a record showing the action in connection with the return of the Arizona Clarence Saunders Stores, Inc., for the income tax year 1929.

Thereupon the instrument was offered in evidence by the Government, and upon permission first had and obtained defendants examined the witness on voir dire.

VOIR DIRE EXAMINATION

Referring to this proffered exhibit I did not make the entries thereon, and do not know of my own knowledge whether or not those entries are correct.

"The COURT: Can you tell who made them?

A. By their handwriting.

Mr. WHITNEY: Where is the original from which this data was taken?

A. I presume it is in Washington, D. C.

(Testimony of Roy M. Davidson.)

Q. That is available on proper subpoena?

A. I don't know.

Mr. WHITNEY: We object to the introduction of this.

The COURT: Who made those entries?

A. One was made by Mr. Cornish. He is dead.

Mr. WHITNEY: Were those entries made under your direct supervision?

A. I have entire charge of the office and see that these things are done.

Q. You don't know anything about the entries yourself?

A. No, just that they are made and by whom they are made.

Mr. WHITNEY: We object to the introduction of this exhibit—you don't know whether they are true or correct or not, do you? [326]

A. I couldn't swear to it.

Q. Nor whether they were correctly copied from the original tax return?

A. I don't know.

Mr. WHITNEY: We object to this document, first on the ground that it is not the best evidence, second, upon the grounds that it is hearsay, third, upon the grounds that this document is not signed by anyone and has a notation on it that shows that the document itself is not complete; on the ground that there

(Testimony of Roy M. Davidson.)

is no foundation showing that this document in any way binds the defendants Greenbaum. It is certainly not the best evidence. Your Honor didn't try these income tax cases, but I recollect during the trial of those cases they had to bring in photostatic, certified, authenticated copies of the returns from Washington, D. C. into this Court Room.

Mr. FLYNN: That was for the purpose of showing the details of the return, your Honor.

Mr. WHITNEY: We object further on the ground there is no opportunity afforded the defendants to cross examine the person who made those entries, no opportunity to cross examine the person who made the original return, if the return was here.

The COURT: There is no doubt but what the return itself would be the best evidence.

Mr. FLYNN: Of what the return contained as to the details, but under the rule of evidence any Government document, the only identification necessary is that it is a Government document, as far as foundation is necessary. There is also a presumption that all Government [327] documents are correctly kept and that they truly represent the records that they purport to represent.

The COURT: I believe that is the rule as to public records."

(Testimony of Roy M. Davidson.)

The witness resumed: They never kept the original income tax returns of corporations in the office here. "They kept the individual tax returns and do now keep the fall individual returns here."

Whereupon the document was again offered in evidence, and the same objection was made, and the additional proceedings were had:

> "Mr. WHITNEY: Further, there is no showing who signed that return and if permitted I would like to ask Mr. Davidson if he knows who signed that return.
>
> A. You mean the Income Tax return?
>
> Q. The original return.
>
> A. No, I don't know who signed it.
>
> Mr. WHITNEY: We object to it on the grounds previously assigned and on the further ground that it is incompetent, irrelevant and immaterial."

Thereupon the Government again offered and there was received in evidence the document referred to which was marked Government's Exhibit 109, of which the following is a photostatic copy: [328]

INCOME TAX

CORPORATIONS

104

Ariz Canyon Sanders Store
(Name and Address)

Incom Engr

(Date of Organization)	(Name of President)	(Kind of Business)	(Remarks)
1925-28	J. [illegible]		
(State in Which Organized)	(Name of Treasurer)		
Ariz	J. [illegible]		

	1926	1927	1928	1929	1930
Extension granted to					
Return filed			3-15-29	3-15-30	
List (month-year)			5-11	5-17	
List (page-line)					
Capital Stock	$	$	$	$	$
Indebtedness			Can		See Card
Gross Income				145 588 44	United Sanders Stores, Inc.
Net Income				Can 150 271 53	
Income Tax 13½ per cent					
Penalty 5 per cent					
Penalty 25 per cent					
Penalty 50 per cent					
Total tax				V	

TREASURY DEPARTMENT, U. S. INTERNAL REVENUE.—Form 649.—Revised Sept., 1926

	1931	1932	1933	1934	1935
Extension granted to					
Return filed					
List (month-year)					
List (page-line)					
Capital Stock	$	$	$	$	$
Indebtedness					
Gross Income					
Net Income					
Income Tax 13½ per cent					
Penalty 5 per cent					
Penalty 25 per cent					
Penalty 50 per cent					
Total tax					

Govt. Exhibit No. 121
Admitted and Filed
NOV 21 1934
J. [illegible], Clerk,
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA.
By [illegible]
Deputy Clerk.

Case No C-4879-Phx
U.S.A. vs Sanders et al

(Testimony of Roy M. Davidson.)

The Greenbaum defendants duly objected to the admitting of Government's Exhibit 109 in evidence upon the following grounds: First, that it is not the best evidence; second, that it is hearsay as to the Greenbaum defendants; third, that the document is not signed by anyone, and that it shows on its face that it is not complete; fourth, that there was no foundation laid for the introduction of the document; fifth, that there was no opportunity afforded the defendants to examine the person who made those entries, or to cross examine the person who made the original income tax return; sixth, that there is no showing that this kind of a document was required to be kept by Statute; seventh, that there is no showing as to who signed the original income tax return; eighth, that the document is incompetent, irrelevant and immaterial; ninth, that the proper procedure would be to bring photostatic, certified and authenticated copies of the original returns from Washington, D. C. into this Court Room, but the Court overruled said objections, to which ruling the Greenbaum defendants then and there duly excepted.

The witness resumed: This card that you now show me is kept as one of the permanent records of the Internal Revenue office in Phoenix, Arizona, in the regular course of business. It is a record made under my direction by someone employed in the Internal Revenue Department.

(Testimony of Roy M. Davidson.)

Thereupon the card was offered in evidence and upon permission being first had and obtained the witness was examined on his voir dire.

VOIR DIRE EXAMINATION

Referring to this last proffered exhibit of the Government, I didn't make the entries on there, and I didn't [331] personally know anything about the truth and correctness of those entries. I personally saw the original return from which this data was made up for that particular year. (1930) I can't testify now whether those figures are true and correct. I don't know who signed the original income tax return. I don't know whether it was signed by John Smith, or by whom. I don't even know of my own knowledge whether it was signed by an officer of the corporation. I know something about the correctness of some of the cards because I make them up myself, but I don't know anything about this one.

"The COURT: Those are official records of your department?

A. They are.

Q. You are required to keep a record of those?

A. We are.

Mr. WHITNEY: One more question, where is the original Income Tax Return from which this data was gotten?

A. I presume it is in the files in Washington.

(Testimony of Roy M. Davidson.)

Q. It is available upon proper application?

A. I presume so.

Q. You haven't it here in Phoenix?

A. No, we haven't it here."

Thereupon the Government offered and there was received in evidence the card referred to, marked Government's Exhibit 110, of which the following is a photostatic copy: [332]

INCOME TAX

CORPORATIONS 110

United Sanders Stores Inc (Formerly Org. Clarence Saunders Stores) Final

(Name and address)

305 So. 2nd Ave - Phoenix Ariz

(Date of Organization) Nov. 23. 1928

(State in Which Organized) Arizona

(Name of President)

(Name of Treasurer) Geo. Eckart, Receiver

(Kind of Business)

(Remarks)

	1926	1927	1928	1929	1930
Extension granted to					3-16-31
Return filed					86 349
List (month-year)					
List (page-line)					
Capital Stock	$	$	$	$	$
Indebtedness					
Gross Income					306 064 71
Net Income				Loss	135 626 67
Income Tax 12 per cent					
Penalty 5 per cent					
Penalty 25 per cent					
Penalty 50 per cent					
Total tax					none

FORM 649—TREASURY DEPARTMENT, U. S. INTERNAL REVENUE—Revised Feb., 1920

	1931	1932	1933	1934	1935
Extension granted to					
Return filed	10-3-1932	3-20-33			
List (month-year)	86 664				
List (page-line)		86 263			
Capital Stock	$	$	$	$	$
Indebtedness					
Gross Income	-0-	Out of business			
Net Income	-0-	Final			
Income Tax 12 per cent					
Penalty 5 per cent					
Penalty 25 per cent					
Penalty 50 per cent					
Total tax	-0-				
	Dr. Mundy				
	end. proceedings of liquidation				

Mundy

(Testimony of Roy M. Davidson.)

The Greenbaum defendants duly objected to the introduction of Government's Exhibit 110 on the following grounds: First, that it was incompetent, irrelevant and immaterial; second, that it is not the best evidence because the original income tax return is available upon proper application; third, for the grounds that it is hearsay; fourth, upon the grounds that it is not signed by anyone; fifth, that it is not binding upon the Greenbaums because no proper foundation has been laid for it, and it has not been properly identified; sixth, the original papers from which this data was taken has not been properly identified, but the Court overruled said objections, to which ruling the said Greenbaum defendants then and there duly excepted.

(Both exhibits 109 and 110 were read to the Jury by the witness).

Thereupon the Greenbaum defendants duly moved to strike each of Government's Exhibits 109 and 110 from the files on the grounds previously assigned in the objections, and particularly upon the grounds that said exhibits were not the best evidence, were hearsay, and that no proper foundation had been laid for their introduction, but the

(Testimony of Roy M. Davidson.)

Court denied said motion, to which ruling the Greenbaum defendants then and there duly excepted.

CROSS EXAMINATION

The original income tax return for the year 1930 was filed in the year 1931. The Stores Company started filing returns in 1928. I have some recollection as to the returns filed by the United Sanders Stores for one year, but cannot remember the exact entries. I do not know how much the taxpayer attempted to take off their accounts receivable that were [335] uncollectible. I do not know what inventory losses were taken. I couldn't say whether taxpayers in filing their income tax returns attempted to get the income at the lowest possible point to get the least possible tax. I don't remember the return, and don't know how much depreciation was charged off. I don't remember what the obsolesence was. I just remember that one of the returns was filed.

"The COURT: What else do you remember?

A. The reason I remember the return was because the man who was making the audit of the return for the year 1930 called my attention to the losses.

Mr. REIN: But the foundation of that loss you know nothing about?

A. No sir."

THEREUPON the Plaintiff, United States of America rested.

Whereupon the defendants made a separate motion to strike each of the Government's Exhibits, objection to the admission of which had theretofore been made by the defendants, but the court separately denied such motions, to which rulings of the court the defendants, by their counsel, then and there duly excepted.

Whereupon, defendants moved the court, at the close of the plaintiff's case, to direct a verdict for the defendants, finding them not guilty, (on the identical grounds hereinafter stated in the motion of the defendants for a directed verdict made at the close of all the evidence) which motion was denied by the court, to which ruling the defendants, by their counsel, then and there duly excepted.

Thereupon, the defendants rested.

Thereupon, both sides rested. [336]

(The foregoing was all the evidence introduced on the trial of this cause.)

Whereupon, defendants moved the court, at the close of all the evidence, to direct a verdict for the defendants, finding them not guilty, upon the following grounds:

1. The evidence is insufficient upon which to base a verdict of guilty.

2. The evidence demonstrates the defendants and each of them are not guilty.

3. The evidence of the Government affirmatively shows that a reasonable doubt as to the guilt of said defendants, and each of them, exists.

4. The Government has wholly failed to connect the said defendants, or any of them, with participation in parts or portions of the alleged scheme to defraud, which are material to the charge.

5. The indictment pleads that the defendants did devise and that they intended to devise one scheme and artifice to defraud, which scheme consists of a number of component parts, the material parts of said alleged scheme, not having been proved by any competent evidence against said defendants, or any of them.

6. The indictment pleads that as a further and material part of the said scheme and artifice the defendants A. E. Sanders and his associates organized under the laws of Arizona, the Piggly-Wiggly Holding Corporation, the name of which was changed to U-Save Holding Corporation, which was thereafter engaged in business in Los Angeles, California. The evidence fails to disclose any connection whatsoever between the said defendants, or any of them, with said allegation in said indictment. [337]

7. The evidence of the Government introduced

in support of the indictment discloses that the defendants, A. E. Sanders and his associates did organize said holding corporation, did make certain representations with respect thereto and did use the United States Mails in furtherance of said representations, whereas said evidence wholly fails to connect Gus B. Greenbaum, Charles Greenbaum or William Greenbaum, or any of them with said corporation, or with said representations or with said use of the mails.

8. The indictment pleads as a further and material part of said alleged scheme and artifice that said U-Save Holding Corporation should and did acquire the majority of common capital stock of the United Sanders Stores, Inc., (the successor in name to said Clarence Saunders Stores, Inc.), and that said U-Save Holding Corporation took charge of the assets of the United Sanders Stores, Inc., and removed merchandise valued at more than $100,000.00 from the warehouses of said latter corporation at Phoenix, Tucson and Nogales, Arizona, and shipped said merchandise to Los Angeles, California, without rendering just and proper compensation therefor. The evidence introduced by the Government wholly fails to connect the said defendants, or any of them, with said parts or portions of said alleged scheme or device, and said evidence affirmatively discloses that said defendants were in no manner

connected with said parts or portions of said alleged scheme or device; that the evidence further discloses that there were more than one scheme, each participated in by different defendants, or parties, independent of each other.

9. The evidence introduced by the Government in attempted support of the allegations of the indictment constitute a material variance from the indictment. [338]

10. The evidence introduced by the Government wholly fails to connect said defendants, or any of them, with the organization or incorporation of said Clarence Saunders Stores, Inc., alleged as a part of said scheme and artifice, and wholl*t* fails to connect said defendants, or any of them, with the changes in the name of said corporation, alleged as a part of said scheme and artifice.

11. The evidence introduced by the Government wholly fails to connect the said defendants, or any of them, with the alleged transfer by the defendant A. E. Sanders, to said corporation, of a certain franchise agreement between the said Sanders and a corporation known as Clarence Saunders Corporation, and fails to connect said defendants, or any of them, with any act or transaction appertaining to said franchise; and said evidence wholly fails to connect said defendants, or any of them, with an option agreement to purchase Cash-Way Stores in Tucson, Arizona, and wholly fails to connect

said defendants, or any of them, with the issuance of 151,000 shares of the common capital stock of Clarence Saunders Stores, Inc., to the defendant A. E. Sanders, all of which are alleged in the indictment herein, as a part of said alleged scheme and artifice.

12. The evidence of the Government affirmatively discloses that the said defendants did not, nor did any of them, participate in the setting up as an asset on the books of said corporation, said franchise agreement between A. E. Sanders and the Clarence Saunders Corporation, in the amount of $151,000.00, and said evidence wholly fails to connect said defendants, or any of them, with said parts or portions of said alleged scheme or artifice.

13. The evidence of the Government wholly fails to connect said defendants, or any of them, with the issuance and delivery [339] to the defendant A. E. Sanders, of 35,000 shares of the common capital stock of said Clarence Saunders Stores, Inc., and fails to connect said defendants or any of them with the sale of three-fifths of said shares, or any other amount or portion thereof, but on the contrary, the evidence of the Government affirmatively discloses that said 35,000 shares of the common stock of said corporation were redelivered to said Clarence Saunders Stores, Inc., and that the defendants did not, nor did any of them, sell or attempt to sell any of the same.

14. There is no competent, relevant or material evidence tending to show that the alleged representations charged as being made by said defendants, or any of them, were false or untrue.

15. The indictment fails to state a public offense under Section 215 of the Criminal Code of the United States of America or any offense whatsoever; that the indictment is fatally duplicitous and multifarious and is vague and uncertain.

16. That the evidence shows one alleged scheme or offense against one group of defendants, and another and distinct scheme or offense against another group of defendants and there is no evidence tending to connect all of the said defendants with the one scheme or offense attempted to be alleged in said indictment.

17. The evidence shows that the scheme to defraud as to Addie Driscoll was fully consummated prior to the time the crime is alleged to have been committed, to-wit, on April 9th, 1930.

18. The Government has failed to prove beyond a reasonable doubt that the letter of April 9th, 1930, was mailed or caused to be mailed by the defendants, or either of them.

19. The evidence fails to show the devising of the scheme [340] alleged in the indictment, and the Statute provides and makes it a crime to devise a scheme to defraud, and not a part of a scheme to defraud, and the Government has, by the evidence,

shown that several parts of the scheme to defraud alleged in the indictment have not been established by the evidence beyond a reasonable doubt.

which motion was denied and overruled by the court, to which ruling the defendants, by their counsel, then and there duly excepted.

Whereupon counsel presented their closing arguments to the jury.

Thereupon the court instructed the jury as follows:

INSTRUCTIONS OF COURT TO JURY

Gentlemen, I will now instruct you as to the law that will guide you in your deliberations in this case:

The defendants in this case, by the first count of the indictment filed herein, are charged with a violation of Section 338, Title 18, United States Code, which makes it a crime to use the United States mails in furtherance of a scheme to defraud.

There were originally several counts to this indictment, but all counts, with the exception of the first, have been dismissed.

Five defendants were named in the indictment, to-wit: A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum. H. D. Sanders has not been apprehended and the defendant A. E. Sanders has entered a plea of nole contendere, and after such plea the

trial of this case has proceeded against Gus, Charles and William Greenbaum, and it is the guilt or innocense of these three defendants that you are [341] called upon to determine.

The statute upon which the first count of the indictment is based reads as follows: "Whoever, having devised or intended to devise any scheme or artifice to defraud, or obtain money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money or any obligation or security of the United States, or of any State, territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle' or 'counterfeit money fraud', or by dealing or pretending to deal in what is commonly called green articles, green coin, green goods, bills, paper goods, spurious treasury notes, United States goods, green cigars, or any other names or terms intended to be understood as relating to such counterfeit or spurious article or attempting so to do, place or cause to be placed any letter, post card, package, writing, circular, pamphlet or advertisement, whether addressed to any person residing within or without of the United States, in any post office, or station thereof, or street or

other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pam- [342] phlet, or advertisement, shall be punished", and so forth.

The indictment in this case is only to be considered as a mere charge or accusation against the defendants and is not of itself any evidence of the defendants' guilt. It is a mere charge of the commission of an offense by the defendants upon which the prosecution and trial is based.

It is your duty, gentlemen, to decide whether or not the defendants are guilty or innocent of the offense as charged, considering all of the evidence submitted to you in the case.

It is not for you to consider the penalty prescribed for the punishment of the offense, and, if you are aware of the penalty prescribed by law, it is your duty to disregard that knowledge. In other words, your sole duty and function is to decide whether the defendants are guilty or innocent. The question of punishment is left wholly to the Court, except as the law circumscribes its power.

In the trial of a case, the Court has a right to question any witness who may be upon the stand,

only for the purpose of eliciting the facts, and, if the Court in this case, in propounding questions to any witness, has led you to believe that the Court had any opinion as to the truth or falsity of the testimony of any witness or as to the guilt or innocence of the defendants, or either of them, it is your duty to wholly disregard such impressions that you may have gathered from the remarks of the Court, as it was not the intent or purpose of the Court to express its opinion upon any such questions. The aim and intent of the Court is to preserve and protect the rights of everybody connected with the trial and to see that the defendants have a fair trial before an impartial jury and to see, if it can, that all the truth is brought out for the information of the court and jury. It has no other desire *ot* disposition.. [343]

You will note from the reading of the statute upon which the first count of this indictment is based, it is provided, that "whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, shall, for the purpose of executing such scheme or artifice, or attempting to do so, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement whether addressed to any person residing without or outside of the United States in any post office or station thereof, or street letter box of the United

States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, post card, package, writing, circular, pamphlet or advertisement, shall be punished as provided by law."

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find the accused guilty of crime. One is direct or positive testimony of an eye witness to the commission of a crime; and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime, by the defendant, and which is known as circumstantial evidence. Such evidence may consist of plans laid for the commission of the crime, or any other acts, declarations or circumstances admitted in evidence tending to connect the defendants with the commission of the crime. [344]

Circumstantial evidence is proof of certain facts and circumstances in any certain case, from which the jury may infer other and connected facts, which usually and reasonably follow according to the common experience of mankind.

While crime may be proven by circumstantial evidence, as well as by direct testimony of eye witnesses,

yet the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendants and inconsistent with any reasonable theory of the defendant's innocence.

You are instructed that on the question of the alleged scheme to obtain money or property by means of fraudulent and false pretenses, the Government need not prove all of the fraudulent acts or false representations alleged in the indictment but must prove enough to satisfy your judgment against the presumption of innocence and beyond a reasonable doubt that one or more of the substantial practices, alluded to and specified in the indictment as fraududent, as to any or all of the defendants, was wilfully and knowingly employed, the question for you to determine is whether enough has been proven within the lines of the charge and not whether all has been proven.

I charge you that the act of placing such letters, post cards, and such in the mail by an agent of the defendant authorized by the defendant to so act for him is the act of the defendant.

You are further instructed that the gist of the offense under Section 338, Title 18, United States Code, that is, an essential element of it, is the prosecution of a fraudulent purpose towards the execution or fulfillment of which the mail is used. One man may devise and accomplish it with or without assistance, but all who, with criminal intent, join themselves, even slightly, to the principal schemers,

are subject to the [345] statute, although they may know only their own share in the aggregate wrongdoing. The law is that whoever directly commits any act constituting an offense defined by any law of the United States, or knowingly aids, abets, counsels, commands, induces or procures its commission, is a principal. So that whoever knowingly aids, abets, counsels, commands, induces or procures the doing of any act constituting a violation of the statute involved, is just as guilty as the principal schemer or schemers.

The testimony in this case shows that there was a plan devised by the defendant Sanders to do certain things, the details of which have been given in evidence here before you, and that the Greenbaums, named herein as defendants, joined the defendant Sanders in furtherance of the undertaking.

The real question in the case — the substantial question in the case—is whether or not the defendants in what they did were acting in good faith. If they were acting in good faith, or, if you have a reasonable doubt as to whether or not they were acting in good faith, then they are entitled to a verdict of acquittal, because, if they were acting in good faith, there could be no scheme on their part to defraud, and the use of the mails in a scheme such as they may have had, if there was no intent to defraud, would not be a scheme for which use of the mails you could in this case find them guilty.

The offense contains two essential elements:

First, that there shall be devised or intended to be devised a scheme or artifice to defraud or for obtaining money or property by means of false representations, pretenses or promises; and, second, that for the purpose of executing such scheme or artifice, or attempting so to do, there shall be placed a letter or post card, writing or circular, in any post office or mail box of the United States, to be sent or delivered by the post office estab- [346] lishment. Both of these elements must be established to your minds beyond a reasonable doubt and to a moral certainty before conviction is authorized. It must be shown beyond a reasonable doubt that the letter described in the indictment was actually sent through the mails, in the interest and furtherance of the scheme charged; that it was mailed in the District of Arizona by some one, defendant or employee, authorized to put it in the mails. When the scheme or artifice to defraud is proven beyond a reasonable doubt, and that the defendants were cooperating in such scheme or artifice, it is not necessary to show that any defendant actually deposited the letter, if the circumstances in evidence show that it was done at the direction or by the authority of the defendants, or any one of hem. It is not necessary that the letter or writing in any instance indicate on its face any fraud, or that it was anything else than an every day and innocent communication. But either by its terms or by extrinsic testimony, it must be shown beyond a reasonable doubt

to have been intended to be a transaction to further some feature of the fraudulent scheme, in furtherance of which the letter is alleged to have been mailed. The official post mark of the post office appearing on the letter or envelope containing the same set up in the indictment, and which has been introduced in evidence, is prima facie proof that said letter was mailed at the point or post office so appearing on said post mark.

You are further instructed that where two or more persons jointly devise and execute a scheme to defraud, they may thereby, in effect, become partners in the criminal purpose. If they do, the acts of each thereafter, during the existence and execution of the scheme, done in furtherance of that execution, may become the acts of all the partners, and each may be convicted of the mailing of a letter which one of the partners [347] mailed or caused to be mailed.

The first question for you to determine is, was there a scheme to defraud? If the evidence in this case fails to satisfy your minds beyond a reasonable doubt that there was devised a scheme to defraud, then it will be unnecessary for you to further consider the evidence, for the reason, that without a scheme to defraud, there could be no conviction under the indictment, as the existence of a scheme to defraud is one of the essential elements of a charge under the mail fraud statute.

The words "scheme" and "artifice", as used in

the statute, include any plan or course of action intentionally devised for the purpose of deceiving and tricking others, and thus fraudulently obtaining their money or property. It is not essential to the making out of a charge that the scheme or artifice should have been successfully carried out. Nor is it a defense for a defendant so charged to show that the persons with whom he dealt and intended to deal received some return for an investment of money, or that they would receive some return for an investment intended to be secured from them. It is essential only that it be shown that the scheme be formed with a fraudulent intent, as alleged in the indictment. It is necessary that the Government prove that the scheme or artifice employed by the defendant was of the kind charged in the indictment.

You are instructed that it is the law that no matter how sound or how practical a scheme or business undertaking may be and no matter how much faith those devising it have in the success of the undertaking, if it is the intention of those devising it or executing it to obtain money by false representations, false pretenses or false promises, it is such a scheme as the statute contemplates, and, if in executing the scheme or undertaking, false representations, false pretenses, or false promises were [348] made by the defendants, or either of them, for the purpose of obtaining money, with knowledge of the falsity thereof, that would constitute a

violation of the statute, provided the mails of the United States are used in furtherance of the consummation of said scheme, as pointed out in these instructions.

It is essential that the letter described in the indictment be shown to have been deposited in the United States mail, for the purpose of being transmitted, and that such letter was delivered by mail according to the direction thereon and that such letter was intended by the defendants to be so transmitted in aid and furtherance of the unlawful scheme or artifice to defraud, if such you find there was. It is not necessary that it be shown that the contents of the letter or writings mailed were of a nature calculated to be effective in carrying out the fraudulent plan, and it is sufficient if, having devised a scheme or artifice to defraud, the defendants deposited, or caused to be deposited, in the Post office, the letter or writing with the thought and intent that they would assist in carrying the scheme into effect, and caused the delivery thereof by the post office establishment of the United States.

The gist of the offense under the first count of the indictment is the misuse of the United States mails. It is not necessary, under the statute on which the first count of this indictment is brought, that a fraudulent scheme or artifice when formed shall contemplate the use of the United States mails as a means of its execution, as the use of the mails in furtherance of a fraudulent scheme or artifice

may be an afterthought not included in the original fraudulent scheme.

With respect to the question of fraudulent intent, it may be said that its existence or non-existence is to be determined by you from all the facts and circumstances admitted in [349] evidence, and your practical experience and daily observations of the intents and acts of men will materially aid you in determining this matter of intention. The intent with which an act is done may be clearly and conclusively shown by the act itself, or by a series of acts, or by the circumstances under which the acts are committed. In many cases, the actions of men speak their intentions more clearly and truthfully than words.

The intent or intention with which acts are committed is manifest by the circumstances connected with the transactions and the sound mind and discretion of the accused. The intent with which an act is committed, being but a mental state of the party accused, direct proof of it is not required, nor indeed can it ordinarily be so shown; but it is generally derived from and established by all of the facts and circumstances attending the doing of the acts complained of, as disclosed by the evidence. In order for you to determine this question of intent, you will look to all of the evidence in the case, oral and documentary, and to all of the facts and circumstances in connection therewith.

The section of the code which has been read and which it is averred in the indictment the defend-

ants violated, denounces as a crime the mailing or causing to be mailed a letter, pamphlet, or advertisement, etc., in the execution of a scheme or artifice to defraud, and for obtaining money or property by means of false or fraudulent pretenses, representations or promises and the evil sought to be remedied is always important in determining the meaning of the statute. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take chances for large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more [350] than one has parted with appeals to the cupidity of all. A legitimate business or going concern may be used as the basis of a scheme to defraud, and, if a person connected with such legitimate business or going concern devises a scheme for the purpose of defrauding others in connection therewith and uses the mails in the execution of such fraudulent scheme, he would be guilty under the statute. In the light of this, the statute must be read, and, so read, it includes everything designed to defraud by misrepresentations as to the past or present or suggestions and promises as to the future. The significant fact is the intent and purpose. Was the intent a good intent, a bona fide intent, or was the intent to profit unlawfully, knowingly, wilfully and fraudulently at the expense of another.

It is, of course, true that a fraudulent intent is never presumed; on the contrary, the law presumes that all men are honest in their motives and their dealings, their relations with others; that they are always actuated by good faith and must not be adjudged in want thereof or to be inspired by evil intent except upon proof of the same beyond a reasonable doubt. So, too, in this same connection, where a given transaction or series of transactions that may be called in question is reasonably susceptible of two different constructions, one that is fair and honest and in consonnance with good faith and the other dishonest and in keeping with the fraudulent intent, then the law says that the jury must adopt the construction in favor of honest, fair dealings and good faith and reject the other looking to the contrary direction.

So, if, in what the defendants did, the transactions they had, the representations they made, and in receipt of the money which was received from various parties you believe that they were acting with entire good faith and that they intended [351] in good faith to carry out the scheme and fulfill the promises as conceived, devised and represented; that they were acting in good faith; then they are not guilty of the offense charged in the indictment. If you have a reasonable doubt as to whether or not that is the case, you should acquit them. If, on the contrary, you believe beyond a reasonable doubt that they were acting with a fraudulent intent, with the intention to deceive and that they

used the United States mail, as charged in the indictment, in furtherance of that sort of fraudulent scheme and intention, then you should find the defendants guilty.

You will note that the indictment charges a certain letter to have been sent through the mail and that it was deposited in the United States mail by the defendants in execution of the scheme to defraud. The letter, standing alone and of itself may not be sufficient to show a fraudulent intent on the part of the defendants but you have the right to consider it in connection with all other evidence in the case, in order to determine with what intent it was so used. Other letters and writings than those set forth in the indictment have been introduced in evidence for the sole purpose of aiding you in determining the intent of the defendants. You have a right to consider these letters, together with other evidence in the case, in determining the questions of intent.

You are further instructed that the evidence in this case shows that the Arizona Clarence Saunders Stores, Inc., one of the corporations mentioned in the indictment, paid certain dividends to some of its stockholders. The Government claims that the corporation had no earnings or profits out of which to pay these dividends and that they were in fact paid out of the capital of the corporation and not out of the earnings, and that they were paid for the purpose of inducing the stockholders [352] and prospective purchasers of stock to believe that the corporation was earning profits.

The term "dividend", as applied to corporation stock or shares, may be defined as that portion of the profits or surplus funds of the corporation which has actually been set apart by a valid act of the corporation for distribution among its stockholders. The term "net profits" or "surplus profits" may be defined as what remains after deducting from the present value of all the assets of the corporation the amount of all liabilities, including capital stock.

With the exception of dividends in liquidation, dividends can be lawfully declared and paid out of net profits only, or conversely stated, when the payment thereof does not impair the capital stock of the corporation.

It is for you to determine from all the evidence in the case whether or not such payments of dividends as you may find were paid by the said corporation were profit payments, that is, whether they were made out of the earned surplus or net earnings of the corporation or out of the capital of the corporation, and you are also to determine, from all the evidence in the case, whether or not such payments, if you find they were made as the Government claims they were, out of the capital of the corporation, were fraudulently made for the purpose of inducing the stockholders and prospective purchasers of stock of the corporation to believe that the corporation was earning profits.

It is common knowledge that most business enterprises are aided by advertisements passing through the mails, and, at every hand we see claims of

capacity, performance, and results which we know cannot stand the test of cross examination. Parties who have anything to sell have the habit of puffing their wares, [353] and we are all familiar with the fact that it is a very prevalent thing in the course of business to exaggerate the merits of goods people have to sell and within any proper reasonable bounds such a practice is not criminal. It must amount to a substantial and wilfull deception before it can be considered criminal.

The intent to defraud in this case, like the intent to defraud in any similar criminal case, is a question of fact and not a question of law and as such question of fact must be found by the jury to be proved by all of the evidence in the case beyond a reasonable doubt and to a moral certainty to justify the jury in finding the defendants, or either of them, guilty.

You are instructed that a man may be visionary in his plans and believe that they will succeed, and yet, in spite of their ultimate failure, be incapable of committing a conscious fraud. Human credulity may include among its victims even the supposed imposter. If you believe that the defendants in this case really entertained the belief of the ultimate success of their project corresponding with the representations, then they did not commit the offense charged. The significant fact is the intent and purpose.

Every normal person is presumed to intend that natural and ordinary results shall attend his voluntary acts.

While a man may not be convicted for acts done in good faith, nevertheless, schemes and devices to induce the making of investments, which plainly would not otherwise be made except for knowingly false representations of material facts and conditions, show culpability which enthusiasm cannot justify nor optimism excuse.

You are instructed that this being a criminal prosecution, each of the defendants is presumed to be innocent until [354] the contrary has been shown beyond a reasonable doubt. This presumption of innocence attends the defendants throughout the trial. The burden of overcoming this presumption rests upon the Government and never reverts to the defendant, and unless the Government has satisfied this requirement as to each defendant the jury will acquit such defendant.

Everyone accused of crime is presumed to be innocent until proven guilty. During the period of that presumption, one, so accused, may combat the evidence brought against him; or he may, if he choose, meet it in silence. This is his right. For its protection the law imposes corresponding silence upon the prosecutor in court. Neither can validly refer or indirectly call attention to his failure to speak in his own defense. Being innocent in the eyes of the law, he is not called upon to meet accusing testimony by contradiction or explanation. Therefore, no presumption can lawfully be raised or comment lawfully be made upon his failure to do that which the law expressly says he shall not be required to do.

You are instructed that the defendants in a criminal case are not required to satisfy the jury of the existence of any fact, which, if true, is a complete defense. It is sufficient if such defendants create in the minds of the jury a reasonable doubt of the existence of such fact.

The official postmark of the post office appearing on the letter or envelope containing the same set up in the first count of the indictment and which has been introduced in evidence is prima facie proof that said letter was mailed at the point or post office so appearing on the postmark, but is no proof that the defendants, or either of them, personally mailed the same.

You are further instructed that where one of the [355] defendants in the case on trial testifies on behalf of the Government, as a witness against the other defendants, or some of them, the Government, by placing him upon the witness stand, and interrogating him in support of the indictment, vouches for his truth and veracity.

You are instructed that the fact that one of the defendants has pleaded nole contendere and does not resist the Government's case against him is not a circumstance to be taken into consideration in considering the guilt or innocence of the other defendants, or any of them, and it is the duty of the Government, nevertheless, to prove the offense as charged in the indictment against each and every other defendant beyond a reasonable doubt and to a moral certainty. And if you should believe

from the evidence that such defendant, so pleading nole contendere and not resisting the Government's case, be guilty of the offense charged, nevertheless, unless you can find beyond a reasonable doubt and to a moral certainty, that the other defendants are guilty of the offense charged in the indictment, it is your duty to acquit such other defendants.

I further instruct you that even though you may find from the evidence that the representations made in the letters and circulars received in evidence on the part of the United States were untrue, nevertheless if the defendants, or any of them, believed such representations to be true, no matter how inaccurate such believe may turn out to be, such belief would be a complete defense.

I have stated to you that the offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or, in other words, the [356] facts proved must all be consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven, and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

The Court instructs the jury that it is not enough, in order to find a defendant guilty on a criminal offense, to suspect that he is guilty thereof, nor even that you believe that there is a strong probability of guilt. It is essential that you believe any such defendant guilty beyond all reasonable doubt, and such belief must be induced by facts and circumstances appearing on the trial which may be considered by you in view of your experience with the ordinary affairs of life.

You are instructed that you are not to be influenced in arriving at your verdict by passion or prejudice against any person. Personal beliefs and feelings not supported by evidence should have no place in entering into your deliberations. Should you fail to heed this admonition you would be violating your oath as juror.

The intent to defraud in this case, like the intent to defraud in any similar criminal case, is a question of fact and not a question of law, to be proved as every other essential fact in the case must be proved.

You are instructed that with respect to the declarations of one defendant made by him outside of the presence of any other defendant, that before such declarations are competent as to any such absent defendant, it must be proved beyond a reasonable doubt, by independent evidence, that the scheme or artifice to defraud alleged in the indictment had been devised, [357] and that such absent defendant was a party thereto. It must

further be established beyond a reasonable doubt that such declaration was made by such defendant, in furtherance of the said scheme or artifice. It is only where knowledge and active participation, or an express or implied ratification of the alleged fraudulent scheme or device can be proved that one defendant is bound by the statements or declarations of another. The fact that the declarations were made before a defendant may have become associated with an alleged scheme or conspiracy, if any there was, does not of itself render the declaration inadmissible against him.

You are further instructed that the burden is upon the Government to prove beyond a reasonable doubt and to a moral certainty as to each defendant that he, or they, or someone under the direction of one or more of the defendants, deposited the mail matter charged as constituting an offense in the United States mails.

The Court instructs the jury that the letter of April 9, 1930, to Addie Driscoll, set forth in the first count of the indictment cannot be regarded as an offense against the United States of America unless you believe that it has been proved beyond a reasonable doubt and to a moral certainty that said letter was mailed in furtherance of a scheme to defraud.

You are instructed that in considering the guilt or innocence of the defendants, or any of them, you cannot take into consideration any of the letters, circulars, or other mail matter, introduced in evi-

dence herein as being sent through the United States mails unless and until you first believe beyond a reasonable doubt and to a moral certainty that the letter to Addie Driscoll, of April 9, 1930, set forth in the first count of the indictment, was mailed by one of the defendants, or [358] under their direction, with the intention of furthering a scheme to defraud, which scheme must itself be proved beyond a reasonable doubt and to a moral certainty.

You are instructed that a corporation may lawfully pay a commission for procuring subscribers to or for selling its capital stock. The stock of an established corporation having a ready sale on the market, may be sold at a profit on a small commission, while stock of a newer or younger corporation may only be sold through greater effort and upon a larger commission. So, an individual or corporation may by force of circumstances be compelled to pay what might seem a high rate of interest, or to give what might seem a large commission in order to raise money, and yet the agreement to pay such interest or such commission may be prompted by honest motives and by sound business judgment. For these reasons, each case must depend upon its own facts and circumstances, and the amount of the commission alone cannot be made the sole criterion of fraud.

Gentlemen, you are the sole judges of the facts in this case; also of the credibility of each and every witness who has testified before you and the

weight that you will give to his testimony. In determining the credibility of any witness, you have a right to take into consideration his manner and appearance while giving his testimony, his means of knowledge of the facts to which he has testified, any interest or motive he may have for his testimony, if shown, and the probability or improbability of the truth of his statements, when measured in connection with all other evidence in the case. If you believe that any witness has wilfully sworn falsely as to any material fact, then you have a right to wholly disregard the testimony of such witness, except insofar as the same may be corroborated by other credible evidence or by facts and circum- [359] stances proven or admitted in the case.

In order to convict the defendants of the crime charged in the indictment, it is incumbent upon the Government to prove to you beyond a reasonable doubt and to a moral certainty the truth of each and every material allegation of the indictment. The law raises no presumption against a defendant, but every presumption of law is in favor of his innocence.

A reasonable doubt, as applied to evidence in criminal cases, is such a doubt as you may entertain as reasonable men after a thorough review and consideration of all the evidence, a doubt for which a reason, arising from the evidence or from the want of evidence exists. It is not, however, a fanciful conjecture of the mind, nor the mere pos-

sibility of a doubt, but it is a substantial, well-founded doubt. It is that state of the case which, after a full and fair review of all the evidence, leaves the mind of a juror in such condition that he cannot say he feels an abiding conviction to a moral certainty of the guilt of the accused. It is an actual sincere, mental hesitation, caused by insufficient or unsatisfactory evidence.

While it is true that the Government is required to prove the guilt of the defendants beyond a reasonable doubt, it is not required to prove their guilt to a mathematical certainty. All that the Court and the jury can act upon is belief to a moral certainty and beyond a reasonable doubt.

Now, if, after fully and fairly considering all of the evidence in this case, you entertain such a reasonable doubt as I have defined as to the guilt or innocence of these defendants, then it becomes your duty to resolve that doubt in favor of the defendants and to return a verdict of not guilty. On the other hand, if, after so considering all of the evidence in the case, you are satisfied beyond a reasonable doubt and to a moral cer- [360] tainty that the defendants have committed the acts charged and constituting the crime set forth in the indictment, then it becomes your duty to return a verdict of guilty.

Three forms of verdicts have been prepared for you, one for each defendant, in this form: "We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defend-

ant Charles Greenbaum, on the first count, blank". A similar form for each defendant.

If you find the defendants guilty you will write the word, "Guilty", in the blank place there for that purpose. If you find them not guilty just write those words in there. When you have retired to your jury room you will elect one of your number as foreman of the jury and when you have agreed upon a verdict you will cause your foreman to sign that verdict which represents your conclusion and return it into open court.

Your verdict must be unanimous.

You may enter an order to the United States Marshal to defray the expenses of this jury during its deliberations. Swear the bailiff.

(Thereupon the bailiff was sworn to take charge of the jury).

The COURT: If you agree upon a verdict by nine o'clock tonight—is there any objection to a sealed verdict in this case, gentlemen? I am at a loss as to this 13th juror.

Mr. MATHEWS: I think at this stage of the proceedings he is dismissed. The emergency is deemed to have passed when the jury retires.

(Said charge of the court as above set forth comprises all the instructions given to the jury in said cause.)

As the conclusion of the court's instructions to the jury the defendants, by their counsel, did, in the presence of [361] the jury and before they retired to deliberate upon their verdict, take the following exceptions:

Mr. REIN: I want to take an exception, Your

Honor, to one of the instructions which says: "that one of the substantial practices"—I think that is erroneous, without defining what is a substantial practice, and when the Court alluded to a lottery scheme and refers to cupidity, I think that is erroneous and I think the instruction on the payment of dividends constitutes a singling out.

Mr. WHITNEY: I believe in your charge, Your Honor stated generally that the use of the United States mails to defraud was the gist of the offense, which is true as an abstract proposition, but we think it should be restricted to the letter of April 9, 1930, which is the only count in the indictment.

The COURT: I thought that it was. Without proof of the mailing of the letter of April 9, 1930, to Mrs. Driscoll, there could be no conviction in this case.

which exceptions were allowed by the court and noted, but the court refused to instruct the jury further in those particulars.

The jury thereupon retired to consider their verdict, and thereafter and on the 28th day of November, 1934, the jury rendered verdicts finding the defendants guilty.

Whereupon and on the 1st day of December, 1934, and within three days after verdicts of guilty were found, the defendants filed a motion for a new trial which was denied on the 5th day of December, 1934, and an exception noted. (No error is assigned on the denial of this motion for the reason that all the points contained in said motion

are herein contained by way of exceptions to various rulings of the court.)

Whereupon, defendants moved to arrest the judgment, [362] which motion was, on December 5, 1934, denied, and an exception noted. (No error is assigned on denial of this motion for the reason that all the points were and are raised on demurrer and motion to quash the indictment.)

FORASMUCH, as the matters above set forth do not fully appear of record, and in furtherance of justice and that right may be done, the defendants tender and present the foregoing as their Bill of Exceptions in this cause, and pray that the same may be settled and allowed, and signed and approved by the Judge of this Court, and made a part of the record in this cause.

DATED at Phoenix, Arizona, this 5th day of January, 1935.

ALEXANDER B. BAKER
LOUIS B. WHITNEY
LAWRENCE L. HOWE
THEODORE E. REIN
Attorneys for Defendants-Appellants. [363]

CERTIFICATE AND ORDER.

The foregoing Bill of Exceptions was filed on the 7th day of January, 1935, within the time allowed for filing the Bill of Exceptions by Order of the United States District Court for the District of Arizona, dated December 22, 1934, fixing and ex-

tending the time within which the Bill of Exceptions is to be settled and filed with the Clerk of this Court, as of January 11, 1935, which is within thirty days after the taking of the appeal, excluding Sundays and legal Holidays, under Federal law and under the law of the State of Arizona. Said Bill of Exceptions contains all the material evidence given and correctly shows all the proceedings had upon the trial of this cause; and said Bill of Exceptions contains the full charge of the court to the jury and the exceptions of the defendants thereto; and said Bill of Exceptions is in all respects correct, and is hereby approved, allowed, and settled, and made a part of the record herein.

DATED at Phoenix, Arizona, this 7th day of January, 1935.

F. C. JACOBS
United States District Judge for the District of Arizona, who presided at said trial.

Service of a copy of the above Bill of Exceptions acknowledged this 4th day of January, 1935.

CLIFTON MATHEWS
United States District Attorney.
By F. E. FLYNN
Assistant United States District Attorney [364]

[Endorsed]: Bill of Exceptions Filed Jan 7 1935

[Endorsed]: Proposed Bill of Exceptions Filed Jan 5 1935 [365]

Minute Entry of
MONDAY, JANUARY 7, 1935

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding.

[Title of Cause.]

F. S. Flynn, Esquire, Assistant United States Attortney, appears on behalf of the Plaintiff.

Messrs. Baker and Whitney, by L. B. Whitney, Esquire, appear as counsel for the Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, and present to the Court said Defendants' Bill of Exceptions for settlement, and the Court having duly considered the same, and being fully advised in the premises by respective counsel.

IT IS ORDERED that said bill of Exceptions be and the same is hereby settled, allowed and approved. [366]

[Title of Court and Cause.]

NOTICE OF APPEAL
(In Duplicate)

Names and addresses of appellants:

Gus B. Greenbaum, 321 W. Almeria Street, Phoenix, Arizona.

Charles Greenbaum, 318 South Reeves Driver, Beverly Hills, California.

William Greenbaum, 144 South Canon Drive, Beverly Hills, California.

Names and addresses of Appellants' attorneys:

Alexander B. Baker, Louis B. Whitney and Lawrence L. Howe, 703 Luhrs Tower, Phoenix, Arizona, and Theodore E. Rein, 10 South LaSalle Street, Chicago, Illinois.

Offense:

Violation of Section 338, Title 18, United States Code Annotated. (Use of United States mails in furtherance of a scheme to defraud.)

Date of Judgment:

December 5th, 1934.

Brief description of judgment or sentence:

Each defendant four (4) years in a Federal Prison to be designated by the Attorney General, and to pay costs of Prosecution.

Name of prison where now confined, if not on bail:

Each appellant on bail in sum of Five Thousand Dollars ($5,000.00).

We, the above named appellants, and each of us, hereby appeal to the United States Circuit Court of Appeals for the [367] Ninth Circuit from the judgment above mentioned on the grounds set forth below.

GUS B. GREENBAUM
CHARLES GREENBAUM
WILLIAM GREENBAUM
Appellants.

Dated: Phoenix, Arizona, this 5th day of December, 1934.

GROUNDS OF APPEAL:

(1) That the indictment was not presented and returned to the Court as provided by law.

(2) That the indictment fails to set forth facts sufficient to constitute an offense against the United States, or against any law or statute of the United States.

(3) That the indictment is vague, indefinite and uncertain.

(4) That the indictment is duplicitous in that it charges in a single count more than one scheme and more than one offense in violation of Section 1024, Revised Statutes of the United States.

(5) That the evidence is insufficient to sustain the verdict and judgment.

(6) That there was a material variance between the proof and the indictment.

(7) That incompetent, irrelevant and immaterial evidence was admitted over the objections of the appellants. [368]

(8) That hearsay and secondary evidence was admitted over the objections of appellants.

(9) That summaries and financial statements prepared by auditors were admitted in evidence, over the objections of appellants, and the books and records from which such summaries and financial statements were made were not admitted in evidence and were not shown to be correct, nor were such books and records shown to be complete, nor were all of the books of account in court or accessible to appellants or their counsel, and such books

and records were not properly identified and no proper foundation was laid for either their admission in evidence nor the admission in evidence of the summaries and financial statements computed and taken from said books and records and they were hearsay as to appellants.

(10) That cards from the office of the Collector of Internal Revenue at Phoenix, purporting to show the income of the United Clarence Saunders Stores, Inc., and its successor in name, were admitted in evidence over the objections of appellants; that such cards were hearsay and not the best evidence, the original income tax returns, or certified copies thereof, not being produced; that the cards failed to show who signed the original income tax returns and no witness in any way identified the entries on said cards, and the appellants were not shown to have any connection with the preparing of the original income tax returns and were not shown to have any knowledge of same or their contents.

(11) Erroneous instructions were given to the jury.

(12) The Court erroneously failed to instruct the Jury as requested by the appellants.

(13) That the verdict is contrary to the law and the evidence. [369]

To all of which the Court, over the objections of appellants, and each of them, ruled adversely to appellants, and each of them, to which rulings the appellants, and each of them, duly excepted.

Received copy of foregoing Notice of Appeal this 5th day of December, 1934.

CLIFTON MATHEWS
United States District Attorney
Attorney for Plaintiff.

[Endorsed]: Filed Dec 5 1934 [370]

Minute Entry of
THURSDAY, DECEMBER 6, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

It appearing to the Court that counsel for Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, have served and filed Notice of Appeal herein,

IT IS ORDERED that attorneys for appellants, and the United States Attorney, appear before the Judge of this Court in Chambers, Saturday, December 8, 1934, at the hour of 9:30 o'clock A. M., for such directions as may be appropriate with respect to the preparation of the record on appeal, pursuant to Rule 7 of the Supreme Court of the United States, Rules of Practice and Procedure. [371]

Minute Entry of
SATURDAY, DECEMBER 8, 1934

October 1934 Term — At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

F. E. Flynn, Esquire, Assistant United States Attorney, appears for the Government, and Messrs Baker and Whitney, by Alexander B. Baker, Esquire, appear as counsel for Defendants, Gus B Greenbaum, Charles Greenbaum, and William Greenbaum, pursuant to the Order fixing the time for such directions as the Court may consider appropriate with respect to the preparation of the Record on Appeal,

IT IS ORDERED that the Defendants, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, prepare and file Praecipe for portions of Record required to be forwarded to the United States Circuit Court of Appeals, and that a copy thereof be served upon the Plaintiff not later than Tuesday, December 11, 1934. [372]

[Title of Court and Cause.]

CLERK'S STATEMENT OF
DOCKET ENTRIES

1. Indictment for Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum filed February 28, 1933.

2. Arraignment March 6, 1933.

3. Plea to Indictment April 21, 1934.

4. Motion to withdraw Plea of Guilty denied—None.

5. Trial by Jury November 7, 1934.

6. Verdict of Guilty Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum November 28, 1934.

7. Judgment of 4 years in a penitentiary to be designated by The Attorney General and costs entered December 5, 1934.

8. Notice of Appeal filed December 5, 1934.

Dated at Phoenix, Arizona, December 5, 1934.

[Seal] ATTEST: J. LEE BAKER
Clerk. [373]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

COME NOW Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, the defendants-appellants in the above entitled cause, and in connection with their appeal make it known that in the records, proceedings, and judgment and sentence appeal from manifest error has intervened to the prejudice of the defendants-appellants, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, in these things, to-wit:

I.

The Court erred in denying the motions to quash the indictment herein and in failing to hold that

said indictment was not presented and returned to the court as provided by law, because it was not presented to the court in the presence of all of the members of the Grand Jury who found the same.

II.

The Court erred in overruling the separate demurrers of the defendant-appellants to the first count in the indictment, for the following reasons, to-wit: [374]

(a) Because the first count of the indictment fails to set forth facts sufficient to constitute an offense against the United States of America under Section 215 of the Criminal Code of the United States of America (Section 338, Title 18, U.S.C.A.) or under any other law *of* statute of the United States of America.

(b) Because the first count of the indictment is vague, indefinite, uncertain and incomplete.

(c) Because the first count of the indictment is duplicitous and multifarious, in that it charges more than one scheme or artifice to defraud, and more than one offense in violation of Section 1024 of the Revised Statutes of the United States (Section 557, Title 18, U.S.C.A.).

III.

The Court erred in denying the motion of defendants-appellants, made at the conclusion of the Government's case, to direct the jury in said cause to return a verdict of not guilty for the reason that

there was no substantial or competent evidence to sustain the charge made in the first count of the indictment.

IV.

The Court erred in denying the motion of the defendants-appellants, made at the close of all the evidence, that the court direct the jury in said cause to return a verdict for the defendants-appellants, finding them not guilty, upon the ground and for the reason that there was no substantial or competent evidence to sustain the charge made in the first count of the indictment, and upon the further grounds, to-wit:

(a) That there was no competent or substantial evidence to [375] show that the defendants named in the first count in the indictment devised or intended to devise a scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations and promises as charged therein.

(b) That there was no competent or substantial evidence to show that the representations and promises charged as being made by defendants-appellants were false and fraudulent, as charged.

(c) That there was no competent or substantial evidence to show that the defendants-appellants mailed or caused to be mailed the letter set forth in count 1 of the indictment.

V.

The Court erred in denying dependants-appellants' motion to direct the jury to return a verdict, finding them not guilty, at the close of all the evidence, for the reason that the evidence introduced by the plaintiff United States of America in attempted support of the allegations contained in the first count of the indictment constituted a material variance from the charge made in the first count of the indictment, in this, to-wit:

(a) That the first count of the indictment charged that the defendants-appellants sold to the persons to be defrauded more than three-fifths of the 35,000 shares of common stock issued and sold to the defendant A. E. Sanders, whereas the evidence showed that the stock sold by the defendants-appellants came from the 151,000 shares of common stock issued to A. E. Sanders pursuant to a permit of the Arizona Corporation Commission.

(b) That the first count of the indictment charged that the defendant-appellants authorized and paid a semi-annual dividend on June 29, 1929, whereas there was no evidence of any [376] such dividend being paid, but the evidence related to a dividend of July 30, 1930.

(c) That the first count of the indictment charged, as a further part of said scheme and artifice, that H. D. Sanders and his associates organized and incorporated the Piggly-Wiggly Holding Corporation, afterwards changed to the U-Save Holding Corporation, whereas the evidence show that

the defendants-appellants had no act or part in said transaction and were not connected therewith in any way.

(d) That the first count of the indictment charged that the U-Save Holding Corporation took charge of the assets of the United Clarence Saunders Stores, Inc. and removed $100,000.00 worth of merchandise from Arizona to Los Angeles, whereas the evidence showed that the defendants-appellants had no act or part in said transaction.

(e) That the first count of the indictment charged that the letter to Addie Driscoll was mailed for the purpose and with the intent on the part of the defendants-appellants of executing the scheme and artifice, whereas the evidence shows that the scheme to defraud as to Addie Driscoll was fully executed prior to the time the crime is alleged to have been committed, to-wit, ~~July~~ April 9, 1930.

VI.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 5, being a document which in substance is as follows:

> Articles of Incorporation of Piggly-Wiggly Holding Corporation of Yuma, dated April 27, 1929, and filed in the office of the Arizona Corporation Commission on May 15, 1929, at the request of Wm. H. Westover, of Yuma, Arizona. Incorporators: H. D. [377] Sanders

and S. I. Haley, both of Yuma, Arizona. Authorized Capital Stock: 60,000 shares of Class A common and 60,000 shares of Class B common, both without nominal or par value, and 40,000 shares of preferred stock at $100.00 each. Provides for 7% annual dividends on preferred stock. Officers named in articles of incorporation: H. D. Sanders, President and Director; Philip Thorp, Vice-President and Director; S. I. Haley, Secretary-Treasurer and Director. Principal Business: To own and operate retail mercantile stores at such places as the company may deem proper, etc.

for the reason that the defendants-appellants were not shown to have any connection or relation with said Piggly-Wiggly Holding Corporation of Yuma, and that such document as to the defendant-appellants was hearsay.

VI.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 6, a document which in substance is as follows:

Certificate of Amendment of Articles of Incorporation of Piggly-Wiggly Holding Corporation of Yuma, dated February 19, 1930, filed in the office of the Arizona Corporation Commission at the request of Wm. H. Westover of

> Yuma, Arizona, on February 24, 1930. Certificate signed by H. D. Sanders and S. I. Haley. The purpose of the certificate was to change the name of the corporation to "U-Save Holding Corporation".

for the reason that the defendants-appellants were not shown to have any connection or relation with said Piggly-Wiggly Holding Corporation of Yuma, and that such document as to the defendants-appellants was hearsay.

VIII.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 8, [378] a document which in substance is as follows:

> Articles of Incorporation of Piggly-Wiggly Southwestern Company, dated July 9, 1927. Filed in the office of the Arizona Corporation Commission July 13, 1927, at the request of Duane Bird of Nogales, Arizona. Incorporators: A. E. Sanders and Lelia Sanders, of Nogales, Arizona. Capital Stock: $200,*00*.00, divided into 10,000 shares of common stock at $10.00 par value, and 1,000 shares of preferred stock at $100.00 par value. Business proposed to be transacted: To carry on and engage in the business of establishing, maintaining and operating "Piggly-Wiggly" stores; to deal in groceries, provisions, etc.

for the reason that the defendants-appellants were not shown to have any connection with said company and for the further reason that there was nothing charged in the first count of the indictment relating to said company.

IX.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 9, a document which in substance is as follows:

> Annual Report of Arizona Clarence Saunders Stores, Inc., at the close of business May 31, 1929, filed in the office of the Arizona Corporation Commission July 1, 1929, at the request of Arizona Clarence Saunders Stores, Inc., Post Office Box 2587, Tucson, Arizona. Executed and sworn to by A. E. Sanders, President, and E. B. Horne, Secretary, on June 29, 1929, at Nogales, Santa Cruz County, Arizona. This report shows:

Assets	$454,280.96
Liabilities	19,024.62
Accumulations	2,516.93
Amount of Capital Stock—	
Paid up and issued	432,739.41
Real Property at Tucson—	
7 stores, 1 warehouse	leased
Real Property at Phoenix—	
3 stores, 1 warehouse	leased

Personal Property: Phoenix and Tucson—fixtures and equipment	50,641.73
Merchandise Stocks	70,115.88

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for the reason that the defendants-appellants were not shown to have any connection with such annual report and that it was hearsay as to them.

X.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 13, a document which in substance is as follows:

> Annual Report of U-Save Holding Corporation (formerly Piggly-Wiggly Holding Corporation) at the close of business June 30, 1930, executed and sworn to in Yuma County, Arizona, by H. D. Sanders, as President, and S. Idelle Haley, as Secretary, July 22, 1930; filed in the office of the Arizona Corporation Commission July 23, 1930, at the request of Piggly-Wiggly Yuma Co. Shows:

Assets	$956,662.59
Liabilities	9,915.47
Accumulations	504,767.22
Amount of Capital Stock Paid up and Issued	337,070.00
Stock contracts	104,910.00

Real Property Owned:	
Situate—Yuma, Ariz.	42,927.21
San Diego, Cal.	1,300.00
Somerton, Ariz.	5,000.00
El Centro, Calif.	21,179.68
Personal Property—Situate:	
Yuma, Arizona: Stock, fixtures & merchandise	7,177.47
Warehouse equipment and merchandise	87,445.81
Piggly-Wiggly stock	130,695.00
Imperial, California:	
Store: fixtures & merchandise	9,506.43

Officers, in addition to the President and Secretary, are given: Vice-Presidents, Philip H. Thorp and C. L. Patterson. The addresses of all the officers are given as Yuma, Arizona, except Philip H. Thorp, whose address is given as San Bernardino, California.

for the reason that there was no connection shown between U-Save Holding Corporation and the defendants-appellants, and for the further reason that the defendants-appellants are not charged [380] in the first count of the indictment with having had any connection with said corporation.

XI.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 89, which reads in substance, as follows:

UNITED SANDERS STORES, INC.

STATEMENT OF PROFIT AND LOSS			Year 1929
Grocery Sales		816,695.36	
Market Sales		179,709.22	
Gross Sales			996,404.58
Merchandise Purchased		1,103,646.32	
Less Inventory December 31, 1929		250,726.77	
Cost of Goods Sold			852,919.55
Gross Profit			143,485.03
Less Operating Expense:			
(Detail of Items omitted)			262,190.62
NET LOSS ON SALES			118,705.59
Plus Other Expense:			
Interest	3,473.61		
Unclassified Losses	1,531.42		
Loss on Bad Checks	811.87	5,816.90	
Less Miscellaneous Gains:			
Earned Discount	9,315.75		
Unclassified Gains	6,321.32	15,637.07	9,820.17
Total Operating Loss			$108,885.42
Analysis of Surplus Account:			
Operating Loss for 1929			$108,885.42
Payment of Dividend on Preferred Stock			25,743.16
Amortization of Organization Expense			10,000.00
TOTAL SURPLUS DEFICIT			$144,628.58

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for the following reasons:

(a) That sufficient opportunity had not been accorded the defendants-appellants to examine the sources from which said profit and loss statement was made.

(b) That the books, records, data and memoranda that underlie said statement had not been introduced in evidence.

(c) That there had been no proper identification of the books and records that were in court.

(d) That there was no attempt to produce the people who made the entries, or anyone having personal knowledge of the facts, and that there had been no showing that such persons were dead, insane, or beyond the reach of process of the court, and that they were not available.

(e) That there was no underlying testimony as to the correctness or regularity of the entries from which said profit and loss statement was compiled.

(f) That the original entries were not in Court and the books and records were shown to be not complete.

(g) That said profit and loss statement was not the best evidence.

(h) That said profit and loss statement was hearsay as to defendants-appellants.

XII.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-

appellants, Government's Exhibit 90, which is in substance as follows, to-wit: [382]

UNITED SANDERS STORES, INC.

PROFIT AND LOSS STATEMENT NINE MONTHS ENDED 9/30/30

Sales			
Retail Grocery		$1,029,675.94	
" Meats		293,921.72	
Wholesale		351,033.80	
Total Sales			$1,674,631.46
Cost of Sales			
Retail Grocery		842,076.42	
" Meats		223,654.48	
Wholesale		331,294.54	
Total Cost of Sales			1,397,025.44
Gross Profit from Sale			277,606.02
Expenses:			
(Detail of Items omitted)			332,172.57
Net Loss Before Other Income & Expense			54,566.55
Other Income			
Interest	161.51		
Discount	8,492.75		
Freight & Delivery	460.32	9,114.58	
Other Expenses			
Cash Discount allowed	571.34		
Interest Paid Miscl.	2,196.55		
" " Bonds	2,917.15		
P & L Items	3,779.64		
Cash Short	1,128.54	10,593.22	1,478.64
Net Loss to Surplus			56,045.19
Profit & Loss Items			
Loss in Merchandise Inventory		5,678.65	
Miscl. Items		67.29	
		5,745.94	
Less: Sundry Credits		2,066.30	
		3,779.64	

for the following reasons:

(a) That sufficient opportunity had not been accorded the defendants-appellants to examine the sources from which said profit and loss statement was made.

(b) That the books, records, data and memoranda that underlie said statement had not been introduced in evidence.

(c) That there had been no proper identification of the books and records that were in court [383]

(d) That there was no attempt made to produce the people who made the entries, and that there had been no showing that such persons were dead, insane, or beyond the reach of process of the court, and that they were not available.

(e) That there was no underlying testimony as to the correctness or regularity of the entries from which said profit and loss statement was compiled.

(f) That the original entries were not in Court and the books and records were shown to be not complete.

(g) That said profit and loss statement was not the best evidence.

(h) That said profit and loss statement was hearsay as to defendants-appellants.

XIII.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of defendants-

appellants, Government's Exhibit 91, which is in words and figures as follows, to-wit:

UNITED SANDERS STORES, INC.

BALANCE SHEET—September 30, 1931

Assets		
Current Assets		
Cash in Bank	1686.81	
Cash & Imprest Funds	7225.00	
Accts. Receivable	25658.82	
Merchandise Inventory	299782.45	
Stock Subscriptions Receivable	91657.95	
Total Current Assets		426012.03
Investments		
Miscl. Stocks & Bonds	4,617.29	
United Sanders Debenture Bonds	80000.00	
Piggly Wiggly Southwest Co.	143880.00	
Total Investments		228497.29
		[384]
Fixed Assets		
Fixtures & Equipment	198899.26	
Less: Allowance for Depreciation	30355.98	
Residual Value		168543.28
Deferred Items		
Supplies on Hand	1579.59	
Prepaid Expense	16959.70	
Recoverable Deposits	2471.16	
Organization Expense	304644.88	
Total Deferred Items		325655.33
Concessions		151000.00
		1299707.93
Liabilities & Net Worth or Capital		
Current Liabilities		
Bank Overdraft	12456.32	
Piggly Wiggly Southwest Co.	8774.70	
Accounts Payable	28396.62	
Accrued Payroll	3178.00	
Notes Payable	18156.77	
Contracts "	3209.49	
Total Current Liabilities		74171.90

Fixed Liabilities		
Bonds or Debentures		158900.00
Total Liabilities		233071.90
Capital and Surplus:		
Preferred Stock Issued and Outstanding	877000.00	
Common " " " "	405014.50	
Total Capital Stock	1282014.50	
Deficit	215378.47	
Net Worth September 30, 1934		1066636.03

for the following reasons:

(a) That sufficient opportunity had not been accorded the defendants-appellants to examine the sources from which the said profit and loss statement was made.

(b) That the books, records, data and memoranda that underlie said statement had not been introduced in evidence.

(c) That there had been no proper identification of the [385] books and records that were in Court.

(d) That there was no attempt made to produce the people who made the entries, and that there had been no showing that such persons were dead, insane, or beyond the reach of process of the court, and that they were not available.

(e) That there was no underlying testimony as to the correctness or regularity of the entries from which said profit and loss statement was compiled.

(f) That the original entries were not in court and the books and records were shown to be not complete.

(g) That said profit and loss statement was hearsay and not the best evidence.

(h) That said profit and loss statement was hearsay as to the defendants-appellants.

XIV.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 43, which is in words and figures as follows, to-wit:

"BOND AND MORTGAGE CORPORATION
Security Building
Phoenix, Arizona
April 9, 1930.

Addie Driscoll,
Box 103,
Douglas, Arizona.

Dear Madam:

Answering your letter of April 8th, we wish to advise that the Common stock of the United Clarence Saunders Stores, Inc., is being offered to the public through this company for $10.00 per share.

Trusting that this is the information you desire, we are, [386]

Yours very truly,

BOND AND MORTGAGE CORPORATION,
By: (Signed) M. LOVELAND,
Assistant Secretary."

for the reason that there was no adequate proof that the defendants-appellants mailed or caused to be mailed said letter, and for the further reason that there was no showing that the defendants-appellants had devised or intended to devise a scheme or artifice to defraud or to obtain money by false pretenses, representations and promises, as alleged in the first count of the indictment.

XV.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 109, a document headed—"INCOME TAX, Ariz. Clarence Saunders Stores, Tucson, Arizona"—being Treasury Department, U. S. Internal Revenue, Form 649, Revised Sept. 1926, (for corporations), which reads in substance, as follows:

(Date of Organization) 10/25/28 (Name of President) ?
(State in Which Organized) Ariz. (Name of Treasurer) ?

	1928	1929	1930
Return filed	3/15/29	2/25/30	
List (month-year)	851 11		
List (page-line)		85 217	
Gross Income	$	$125 588 45	$
Net Income	Loss None	150 271 53	See card United Sanders Stores, Inc.

for the following reasons: [387]

(a) That it is not the best evidence.

(b) That it is hearsay as to the defendants-appellants.

(c) That the document is not signed by anyone and shows on its face that it is not complete.

(d) That there was no foundation laid for the introduction of the document.

(e) That there was no opportunity afforded the defendants-appellants to examine the person who made the entries on the document, or to cross examine the person who made the original income tax return.

(f) That there was no showing as to who signed the original income tax returns.

(g) That the original income tax returns were in the custody of the Government and under the Act of Congress (February 24, 1919) were available as primary original evidence.

XVI.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 110, a document headed—"INCOME TAX, United Sanders Stores, Inc. (formerly Ariz. Clarence Saunders Stores), 305 So. 2nd Ave., Phoenix, Ariz.", being Treasury De-

partment, U. S. Internal Revenue, Form 649, Revised Sept. 1926, (for corporations), which reads in substance, as follows:

[388]

(Date of Organization) Nov. 23—1928
(State in Which Organized) Arizona

(Name of President)
(Name of Treasurer) Geo. J. Erhart, Receiver

FINAL (Remarks)

	1930	1931	1932
Return filed	3-16-31	10-3-1932	3-20-33
List (month-year)	86 349	86 644	86 263
List (page-line)			
Gross Income	306 054 21	— —	— —
Net Income Loss	135 626 67	— —	— —
			Out of business Final
Total Tax	none	— —	
	In receivership and process of liquidation		

for the following reasons:

(a) That it is not the best evidence.

(b) That it is hearsay as to the defendants-appellants.

(c) That the document is not signed by anyone and shows on its face that it is not complete.

(d) That there was no foundation laid for the introduction of the document.

(e) That there was no opportunity afforded the defendants-appellants to examine the person who made the entries on the document, or to cross examine the person who made the original income tax return.

(f) That there was no showing as to who signed the original income tax return.

(g) That the original income tax returns were in the custody of the Government and under the Act of Congress (February 24, 1919), were available as the best evidence.

XVII.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 53, a document which in substance is as follows: [389]

> A mimeographed copy of letters to stockholders of United Clarence Saunders Stores, Inc., dated September 29, 1930, mimeographed signature of A. E. Sanders, President, calling attention to stockholders meeting to be held November 1, 1930, for the purpose of changing the name to United Sanders Stores, Inc. Also states that under the present franchise agreement with Clarence Saunders they have to pay him 1/2 of 1% of the gross volume of business, which amounts to about $10,000.00 a year, and that under the new plan they will be able to increase their volume of business and save the stockholders this immense royalty by doing away with the Clarence Saunders franchise agreement. Attached to letter is a notice of special meeting to stockholders and blank proxy.

for the reason that such document was hearsay and not binding upon the defendants-appellants.

XVIII.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 54, a document headed "United Clarence Saunders Stores, Inc., 305 South Second Avenue, Phoenix, Arizona", and being a notice to stockholders, dated October 6, 1930, which is in substance as follows:

> It states that the primary purpose of the meeting is to change the name of the company to United Sanders Stores, Inc., of Arizona, and to change the plans of the company in respect to operation and management of additional stores proposed to be established. It calls attention to the royalty payments to the Clarence Saunders Corporation mentioned in Exhibit 53. It states that the stores would be operated under the name of Sanders U-Save System and would control forty-two stores and five warehouses of four separate corporations, namely, United Clarence Saunders Stores, Inc., Piggly-Wiggly Southwestern Company, Piggly-Wiggly Yuma Company and U-Save Holding Corporation, all doing a business of over $3,000,000.00 annually and having assets of approximately $2,800,000.00. It gives the qualifications of Mr. H. D. Sanders, who will assume control of the Arizona unit, and his associates K. C. Can Atta, A. M. Kaler, Warfield Ryley, Cy Measday, J. S. Mackin and A. E. Sanders. It states

> that a Re-sales Department to handle the resale of the corporate securities will be established which will create an active market for the securities. [390]

for the reason that said exhibit did not tend to connect the defendants-appellants with the charge contained in the first count of the indictment and was not binding upon them, and was hearsay.

XIX.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 56, being a mimeographed letter to stockholders of United Sanders Stores, Inc., dated January 15, 1931, signed by H. D. Sanders, President, and G. C. Partee, Secretary, which is in substance as follows:

> It states that the company has expanded, has in operation twenty-six retail stores in Arizona, owns practically all of the stock of Piggly-Wiggly Southwestern Company; that the year 1930 had been a hard year; that most of the difficulties have been overcome; that the U-Save Holding Corporation has purchased the control of the common stock and is co-operating in the operation of the business which will be very beneficial to the stockholders. It predicts the reduction in expense, the opening of new stores and states that the company is in good financial position.

for the reason that said defendants-appellants had no connection with said Exhibit or the matters and things therein stated, and it was hearsay as to them.

XX.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 64, which is a form letter from United Sanders Stores, Inc., dated January 10, 1931, addressed to the stockholders of the company, signed by G. C. Partee, Secretary, which Exhibit is in substance [391] as follows:

> It states the rapid progress made by the company; that on account of business depression it took a market loss on merchandise. It comments on the financial difficulties of Clarence Saunders Stores, Inc., at Memphis, Tennessee; that the failure affected all units operating under the concessions; that the company was required to change its set-up and its policy of expansion; that in October, 1930, the U-Save Holding Corporation purchased control of the common stock and since that time has been in active management of its affairs with the reduction in expenses of $50,000.00 per annum; that the U-Save Holding Corporation purchased the warehouse stocks of the company at actual inventory and agreed to serve the company at cost, plus five percent; that the warehouse stocks inventoried at approximately

$110,000.00 and that U-Save Holding Corporation issued in payment $60,100.00 in preferred stock and paid off $40,000.00 of current liabilities that the deal was very advantageous to the stockholders of United Sanders Stores and concludes with a statement of assets and liabilities as follows:

Current Assets	$423,652.91
Fixed Assets	170,316.93
Net Outside Investments	87,685.10
Deferred Assets	74,076.47
Organization and Development	259,963.24
Concessions	151,000.00
Total Accounts Payable	63,491.17
Payroll	2,069.66
Notes	10,689.74
Debenture Bonds outstanding—	
Less in Treasury	83,900.00
Net Worth	939,944.06

for the reason that said Exhibit was incompetent and not binding upon, or applicable to, the defendants-appellants, and was pure hearsay as to them.

XXI.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibits 68 and 69, purporting to evidence the dividend account of the Arizona Clarence Saunders Stores, Inc. with the Valley

Bank of Phoenix, Arizona. Said Exhibits are in substance as follows: [392]

EXHIBIT 68:

Shows an original deposit on September 4, 1929, of $576.79, and thirty-seven checks drawn against the same in varying amounts, with a withdrawal of the entire balance of $470.40 on December 13, 1929.

EXHIBIT 69:

Shows checks drawn and balances from time to time from November 4, 1929, to December 13, 1929, both inclusive, duplicating in part, and furnishing no information in addition to Exhibit 68.

for the following reasons:

(a) That said Exhibits were not properly identified.

(b) That said Exhibits are hearsay as to defendants-appellants.

(c) That there was no connection shown between said Exhibits and the defendants-appellants.

XXII.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 76, which is in substance as follows:

Instructions to The Valley Bank at Phoenix, Arizona, dated July 2, 1929, with reference to account in that bank, giving copy of resolution passed by the Board of Directors at a meeting held June 29, 1929, authorizing A. E. Sanders, President, to sign or endorse checks, drafts, notes, or other negotiable paper or securities on any and all depositories of Arizona Clarence Saunders Stores, Inc., without any countersignature, and authorizing Warfield Ryley to sign checks or drafts on any banks or depositories of the Arizona Clarence Saunders Stores, Inc., when duly countersigned by Willis M. Dent, M. V. Lee or E. B. Horne. The signatures at the bottom of these instructions are: A. E. Sanders, E. B. Horne, Warfield Ryley, Willis M. Dent, M. V. Lee and E. A. Lasalle.

for the following reasons:

(a) That it was not the best evidence.

(b) That it was hearsay as to the defendants-appellants. [393]

XXIII.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 107, being part of the ledger account of Greenbaum Brothers in the books of the United Clarence Saunders Stores, Inc., which in substance is as follows:

Account of Greenbaum Brothers, 700 Security Building, Phoenix, Arizona, in capital stock ledger, showing various certificates of common stock cancelled and re-issued, between May 24, 1929, and November 18, 1929. The last item in this account, however, is dated June 30, 1930, whereby 200 shares were transferred to Bond and Mortgage Corporation, balancing out the account; also showing stock issued to them out of A. E. Sanders' 151,000 shares.

Notation: May 2, 1929—Cert. 272 for 3,850 shares were issued to the Greenbaum Brothers from A. E. Sanders' stock.

December 12, 1929—Cert. 963 for 5,000 shares, and Cert. 962 for 500 shares, were issued to the Greenbaum Brothers from A. E. Sanders' stock.

December 12, 1929—Cert. 965 for 2105 shares was issued to the Greenbaum Brothers from A. E. Sanders' stock.

June 30, 1930—JV-251—200 shares transferred to Bond and Mortgage Corporation, balancing out the account.

for the reason that it did not tend to prove any offense charged in the first count of the indictment, and that the proper *d*oundation had not been laid for its introduction, and that it was hearsay as to the defendants-appellants.

XXIV.

The Court erred in admitting in evidence in behalf of the plaintiff United States of America, over the objection and exception of the defendants-appellants, Government's Exhibit 104, being part of the ledger account of Bond and Mortgage Corporation [394] in the books of the United Clarence Saunders Stores, Inc., which in substance is as follows:

> Account of Bond and Mortgage Corporation in capital stock ledger, consisting of 17 pages (contained in Government's Exhibit 92 for identification) showing cancellation and re-issuance of various certificates of common stock owned by Bond and Mortgage Corporation, between December 18, 1929, and February 14, 1931, being part of the stock transferred to it out of A. E. Sanders' 151,000 shares; also showing detail of certificates issued to it.

for the reason that it did not tend to prove any offense charged in the first count of the indictment, and that the proper foundation had not been laid for its introduction, and that it was hearsay as to the defendants-appellants.

XXV.

The Court erred in sustaining an objection of the plaintiff United States of America, over the exception of defendants-appellants, to an offer of proof

by the defendants-appellants, in substance as follows:

> At this time the defendants Greenbaum, and each of them, avow that the witness Brandt would testify that at such conference and in the presence of the persons named, he did state to them that there was a shortage of $5,000.00 in the account of the United Clarence Saunders Stores, and that he was responsible for the shortage, and that out of the $5,000.00 by him taken from the United Clarence Saunders Stores, he had checked out the sum of $2,500.00 for his own personal use, in separate checks, and if asked how this shortage of funds from the Stores Company was effectuated or consummated, would testify in response thereto that checks of the Stores Company were made up in duplicate, and that the original check figuring in this transaction, that is, the check of $5,000.00 in its original form showed payable to the Phoenix Packing Company, but that the duplicate check showed United Clarence Saunders Stores, and that the explanation on the duplicate check was that the sum of $5,000.00 had been advanced to the Kansas unit, and that accordingly the books of account of the Sanders Stores here showed an entry or a charge of $5,000.00 as organization and development expense, when in truth and in fact such entry was false and was but a device to cover up

the speculation or embezzlement of the witness Brandt. We avow that if permitted to ask the witness Brandt as to the time in which he [395] took $5,000.00 of the Stores Company's money for his own personal use, he would state it was taken around about the 26th or 27th of June, 1930, in the form of check on the Saunders Stores, signed by himself, drawn upon the First National Bank of Phoenix and that the withdrawal was charged against the Kansas unit to organization and development expenses. We will avow if permitted to ask the witness Brandt what disposition was made by him of the money withdrawn from the Saunders Stores he would testify that he deposited $2,000.00 of that embezzled sum in the Commercial National Bank of Phoenix, and that he afterwards withdrew from the Commercial Bank from time to time the sum in question, and that he subsequently deposited $1,000.00 of the funds so taken from the Stores Company to his personal account in the First National Bank, and that the money so taken by him through the scheme was used for his own personal use, and that it was covered up by a fictitious entry in the books of the company, and we avow further that it can be developed through this witness that many of the books and records of the company were kept by him at his own home, and not at the company office, for the purpose of concealing these

transactions, which books and records are not now present in court.

for the reasons:

(a) That defendants-appellants should have been allowed to test the credibility of the witness.

(b) That such evidence offered would tend to show that the books and records of the corporation were incorrect.

XXVI.

The Court erred, over the exception of defendants-appellants, in refusing to admit in evidence defendants-appellants' Exhibit "F" for identification, consisting of four checks, said checks being offered for the purpose of impeaching the witness Tom H. Brandt, and further establishing that the books and records of said corporation, Government's Exhibits 34 to 39 for identification, both inclusive, did not correctly set forth the transactions of said corporation, which said checks are in substance as follows:

Check No. 16, of the Phoenix Packing Company, drawn on The Valley Bank of Phoenix, Arizona, dated Phoenix, Arizona, 7/1/1930, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $500.00, and endorsed Tom H. Brandt, showing payment thereof on July 1, 1930.

Unnumbered check of the Phoenix Packing

Company, drawn on The Valley Bank of Phoenix, Arizona, 7/2/1930, signed by Tom H. Brandt [396] as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $2,000.00, and endorsed Tom H. Brandt, showing payment thereof on July 3, 1930.

Check No. 41, of the Phoenix Packing Company, drawn on The Valley Bank of Phoenix, Arizona, dated Phoenix, Arizona, 7/2/1930, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $500.00, and endorsed Tom H. Brandt, showing payment thereof on July 25, 1930.

Check No. 42, of the Phoenix Packing Company, drawn on The Valley Bank of Phoenix, Arizona, dated Phoenix, Arizona, 7/24/30, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $100.00 and endorsed Tom H. Brandt, showing payment thereof on July 24, 1930.

XXVII.

The Court erred in giving the following instruction to the jury during the course of the charge to the jury, to-wit:

"You are instructed that on the question of the alleged scheme to obtain money or property by means of fraudulent and false pretenses, the Government need not prove all of the fraudulent acts or false representations alleged in the

indictment but must prove enough to satisfy your judgment against the presumption of innocense and beyond a reasonable doubt that one or more of the substantial practices, alluded to and specified in the indictment as fraudulent, as to any or all of the defendants, was wilfully and knowingly employed, the question for you to determine is whether enough has been proven within the lines of the charge and not whether all has been proven."

which said instruction was duly excepted to upon the ground that the expression "substantial practices" was indefinite and undefined and tended to confuse the jury, and that the expression "within the lines of the charge" was indefinite, uncertain and tended to confuse the jury.

XXVIII.

The Court erred in giving the following instruction to the jury during the course of the charge to the jury, to-wit:

"It is common knowledge that nothing is more alluring [397] than the expectation of receiving large return on small investments. Eagerness to take chances for large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than one has parted with appeals to the cupidity of all."

to which said instruction the defendants-appellants duly excepted upon the ground that the same was prejudicial, unnecessary and not justified by the record.

XXIX.

The Court erred in giving the following instruction to the jury during the course of the charge to the jury, to-wit:

> "You are further instructed that the evidence in this case shows that the Arizona Clarence Saunders Stores, Inc., one of the corporations mentioned in the indictment, paid certain dividends to some of its stockholders. The Government claims that the corporation had no earnings or profits out of which to pay these dividends and that they were in fact paid out of the capital of the corporation and not out of earnings, and that they were paid for the purpose of inducing the stockholders and prospective purchasers of stock to believe that the corporation was earning profits.
>
> The term 'dividend', as applied to corporation stock or shares, may be defined as that portion of the profits or surplus funds of the corporation which has actually been set apart by a valid act of the corporation for distribution among its stockholders. The term 'net profits' or 'surplus profits' may be defined as what remains after deducting from the present value of all the assets of the corporation the

amount of all liabilities, including capital stock.

With the exception of dividends in liquidation, dividends can be lawfully declared and paid out of net profits only, or conversely stated, when the payment thereof does not impair the capital stock of the corporation.

It is for you to determine from all the evidence in the case whether or not such payments of dividends as you may find were paid by the said corporation were profit payments, that is, whether they were made out of the earned surplus or net earnings of the corporation or out of the capital of the corporation, and you are also to determine, from all the evidence in the case, whether or not such payments, if you find they were made as the Government claims they were, out of the capital of the Corporation, were fraudulently made for the purpose of inducing the stockholders and prospective purchasers of the stock of the corporation to believe that the corporation was earning profits." [398]

to which said instruction defendants-appellants duly excepted upon the ground that the same constituted a singling out of one part or portion of the evidence, and upon the ground that the same did not correctly state the law as to the payment of dividends.

WHEREFORE, the said Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, defendants-appellants in the above entitled cause, by

reason of the errors aforesaid, and upon the record in said cause, pray that the said judgments and sentences against and upon them, the said Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, under the indictment herein, may be reversed and held for naught.

ALEXANDER B. BAKER
LOUIS B. WHITNEY
LAWRENCE L. HOWE
THEODORE E. REIN
Attorneys for Defendants-Appellants

Due and legal service of a copy of the above and foregoing Assignment of Errors admitted this 4th day of January, 1935.

CLIFTON MATHEWS
United States District Attorney,
By F. E. FLYNN
Assistant United States District Attorney

[Endorsed]: Filed Jan 4 1935 [399]

[Title of Court and Cause.]

BAIL BOND PENDING APPEAL

KNOW ALL MEN BY THESE PRESENTS: That we, Gus B. Greenbaum, as Principal, and Commercial Standard Insurance Company, a corporation organized and existing under and by virtue of the Laws of the State of Texas, and authorized

to do and transact a surety business in the State of Arizona and in the United States Courts within the State of Arizona, as Surety, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand and no/100 Dollars ($5,000.00) to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our lawful successors and assigns, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the 5th day day of December, in the year of Our Lord, One Thousand Nine Hundred Thirty-four.

WHEREAS, lately at the October term, A. D. 1934, of the District Court of the United States for the District of Arizona, in a suit pending in said court between the United States of America, plaintiff and Gus B. Greenbaum, defendant, a judgment and sentence was rendered against the said Gus B. [400] Greenbaum, and the said Gus B. Greenbaum has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit, and notice of such appeal, in duplicate, having been filed with the Clerk of the District Court of the United States for the District of Arizona, and a copy of such Notice of appeal having been duly served upon the United States Attorney for the District of Arizona, in the manner, and within the time, required by law and the rules

of the court in such cases made and provided:

NOW the condition of the above obligation is such that if the said Gus B. Greenbaum shall appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, California, on such day or days as may be appointed for the hearing of said cause in said court, and upon such day or days as may be appointed by said court until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said District Court of the United States for the District of Arizona against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation shall be void, else to remain in full force and effect.

GUS. B. GREENBAUM
Principal.

COMMERCIAL STANDARD INSURANCE COMPANY OF DALLAS, TEXAS.

[Seal] By I S LESSER
Its Attorney-in-fact.

APPROVED:

F. C. JACOBS
United States District Judge. [401]

[Endorsed]: Filed DEC 5 1934 [402]

[Title of Court and Cause.]

BAIL BOND PENDING APPEAL

KNOW ALL MEN BY THESE PRESENTS: That we, Charles Greenbaum, as Principal, and Commercial Standard Insurance Company, a corporation organized and existing under and by virtue of the Laws of the State of Texas, and authorized to do and transact a surety business in the State of Arizona and in the United States courts within the State of Arizona, as Surety, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand and no/100 Dollars ($5,000.00) to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our lawful successors and assigns, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the 5th day day of December, in the year of Our Lord, One Thousand Nine Hundred Thirty-four.

WHEREAS, lately at the October term, A. D. 1934, of the District Court of the United States for the District of Arizona, in a suit pending in said court between the United States of America, plaintiff, and Charles Greenbaum, defendant, a judgment and sentence was rendered against the said Charles [403] Greenbaum and the said Charles Greenbaum has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the

aforesaid suit, and notice of such appeal, in duplicate, having been filed with the Clerk of the District Court of the United States for the District of Arizona, and a copy of such Notice of appeal having been duly served upon the United States Attorney for the District of Arizona, in the manner, and within the time, required by law and the rules of the court in such cases made and provided:

NOW the condition of the above obligation is such that if the said Charles Greenbaum shall appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, California, on such day or days as may be appointed for the hearing of said cause in said court, and upon such day or days as may be appointed by said court until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said District Court of the United States for the District of Arizona against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Cir-

cuit, then the above obligation shall be void, else to remain in full force and effect.

CHARLES GREENBAUM
Principal.

COMMERCIAL STANDARD INSURANCE COMPANY OF DALLAS, TEXAS.

[Seal] By I S LESSER
Its Attorney-in-fact.

APPROVED:

F. C. JACOBS
United States District Judge. [404]

[Endorsed]: Filed DEC 5 1934 [405]

[Title of Court and Cause.]

BAIL BOND PENDING APPEAL

KNOW ALL MEN BY THESE PRESENTS: That we, William Greenbaum, as Principal, and Commercial Standard Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Texas, and authorized to do and transact a surety business in the State of Arizona and in the United States courts within the State of Arizona, as Surety, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand and no/100 Dollars ($5,000.00) to be paid to the said United States of America, to which payment well and truly be made,

we bind ourselves, our lawful successors and assigns, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the 5th day of December, in the year of Our Lord, One Thousand Nine Hundred Thirty-four.

WHEREAS, lately at the October term, A.D. 1934, of the District Court of the United States for the District of Arizona, in a suit pending in said court between the United States of America, plaintiff, and William Greenbaum, defendant, a judgment and sentence was rendered against the said William [406] Greenbaum, and the said William Greenbaum has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit, and notice of such appeal, in duplicate, having been filed with the Clerk of the District Court of the United States for the District of Arizona, and a copy of said Notice of Appeal having been duly served upon the United States Attorney for the District of Arizona, in the manner, and within the time, required by law and the rules of court in such cases made and provided:

NOW the condition of the above obligation is such that if the said William Greenbaum shall appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, California, on such day or days as may be appointed for the hearing of said cause in said court, and upon such day or

days as may be appointed by said court until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said District Court of the United States for the District of Arizona against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation shall be void, else to remain in full force and effect.

WILLIAM GREENBAUM
Principal.

COMMERCIAL STANDARD INSURANCE COMPANY OF DALLAS, TEXAS.

[Seal] By I S LESSER
Its Attorney-in-fact.

APPROVED:

F. C. JACOBS
United States District Judge. [407]

[Endorsed]: Filed DEC 5 1934 [408]

[Title of Court and Cause.]

DEFTS PRAECIPE FOR RECORD ON APPEAL

To the Clerk of the District Court of the United States for the District of Arizona:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above entitled cause, and to include in such transcript of record the following:

(1) The Indictment,

(2) Motion of Gus B. Greenbaum to Quash Indictment.

(3) Motion of Charles Greenbaum to Quash Indictment.

(4) Motion of William Greenbaum to Quash Indictment.

(5) Separate Demurrer of Gus B. Greenbaum.

(6) Separate Demurrer of Charles Greenbaum.

(7) Separate Demurrer of William Greenbaum.

(8) Motion for New Trial.

(9) Motion in Arrest of Judgment.

(10) Notice of Appeal.

(11) Clerk's Statement of Docket Entries.

(12) Assignment of Errors (When Filed)

(13) All Minute Entries therein. [409]

(14) Bill of Exceptions, when settled and approved by the Court and made a part of the Record.

(15) Certificate of the United States District Judge to Bill of Exceptions, and Order approving, settling, allowing and making the same a part of the Record herein.

(16) This Praecipe.

DATED at Phoenix, Arizona, this 11th day of December, 1934.

BAKER & WHITNEY
LAWRENCE L. HOWE
THEODORE E. REIN (W)
Attorneys for Appellants. 703 Luhrs Tower, Phoenix Arizona.

Service of the above praecipe acknowledged and accepted this 11th day of December, 1934.

CLIFTON MATHEWS
F. E. FLYNN
Attorneys for Appellee.

[Endorsed]: Filed DEC 11 1934 [410]

[Title of Court and Cause.]

PRAECIPE FOR ADDITIONAL PAPERS TO BE INCLUDED IN THE TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States for the District of Arizona:

You are hereby requested to include in the transcript of record, in addition to that included in

the Praecipe heretofore filed on the 11th day of December, 1934, the following:

1. Bail Bond Pending Appeal of Gus B. Greenbaum.

2. Bail Bond Pending Appeal of Charles Greenbaum.

3. Bail Bond Pending Appeal of William Greenbaum.

4. Judgment and sentence of each of the defendants Gus B., Charles and William Greenbaum.

Dated: at Phoenix, Arizona this 7th day of January, 1935.

ALEXANDER B. BAKER
LOUIS B. WHITNEY

LAWRENCE L. HOWE
THEODORE E. REIN (W)
Attorneys for Appellants. 703 Luhrs Tower Phoenix, Arizona.

Service of the above praecipe acknowledged and accepted this 7th day of January, 1935.

CLIFTON MATHEWS
F. E. FLYNN
Attorneys for Appellee [411]

[Endorsed]: Filed JAN 7 1935 [412]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

In the United States District Court for the District of Arizona

United States of America
District of Arizona—ss:

I, J. LEE BAKER, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, versus A. E. Sanders, H. D. Sanders, Gus B. Greenbaum, Charles Greenbaum, and William Greenbaum, Defendants, numbered C-4879-Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 413 inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $75.90 and that said sum has been paid to me by counsel for the appellants.

WITNESS my hand and the Seal of the said Court this 10th day of January, 1935.

[Seal] J. LEE BAKER
Clerk. [413]

[Endorsed]: No. 7695. United States Circuit Court of Appeals for the Ninth Circuit. Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed January 14, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7695

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUS B. GREENBAUM, CHARLES GREENBAUM AND WILLIAM GREENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS

Upon Appeal From The United States District Court For The District of Arizona

---

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
LAWRENCE L. HOWE,
703 Luhrs Tower,
Phoenix, Arizona.

THEODORE E. REIN,
10 South LaSalle Street,
Chicago, Illinois.

Attorneys for Appellants.

No. 7695

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUS B. GREENBAUM, CHARLES GREENBAUM AND WILLIAM GREENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS

Upon Appeal From The United States District Court For The District of Arizona

---

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
LAWRENCE L. HOWE,
703 Luhrs Tower,
Phoenix, Arizona.

THEODORE E. REIN,
10 South LaSalle Street,
Chicago, Illinois.

Attorneys for Appellants.

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TABLE OF CASES CITED

TEXTBOOKS AND STATUTES CITED

No. 7695

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUS B. GREENBAUM, CHARLES GREENBAUM AND WILLIAM GREENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

Appellants, Gus B. Greenbaum, Charles Greenbaum and William Greenbaum, appeal from a judgment of the District Court of the United States for the District of Arizona, finding them guilty and sentencing each of them to a term of imprisonment of four years under an indictment returned at the November, 1932, Term of the District Court, pursuant to which they, together with one A. E. Sanders and one H. D. Sanders, were charged with the use of the United States mails in furtherance of a scheme to defraud. (Section 338, Title 18, United States Code Annotated; Section 215 United States Penal Code.) The indictment was returned at the Tucson Division of the Court on

*Where figures only appear in parentheses, in this brief, they refer to pages in the printed Transcript of Record.

February 28, 1933 (107-108).* Inasmuch as the questions presented for review involve a consideration of the legal sufficiency of the indictment, the evidence introduced thereunder and the instructions of the court, each of these subjects, for purposes of convenience, will be treated under separate headings.

THE INDICTMENT

The indictment, charging a use of the United States mails in furtherance of a scheme to defraud in violation of Section 338, Title 18, United States Code Annotated, was returned and presented in seventeen counts, each count charging the offense against five defendants, including in addition to appellants, A. E. Sanders and H. D. Sanders, his brother, the latter two being the first named in the indictment.

The separate demurrers of appellants were sustained as to counts two to seventeen, inclusive, leaving the first count only upon which the defendants were tried. This first count, in a series of patchwork allegations, attempts to charge the offense substantially as follows:

Prior to the **dates* on which the letters were mailed "as hereinafter alleged *in the several counts* of this indictment," the five named defendants "did devise, and intended to devise," a scheme and artifice to defraud, *and* to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth, from certain named individuals, including one Addie Driscoll, the letter to whom, included in the first count of the indictment, constituted the only alleged misuse of the mails (13). Letters to the other individuals named in the first

*Emphasis ours except as otherwise noted.

paragraph of the first count of the indictment were the subject matter of the subsequent counts to which the demurrers had been successfully interposed. It is charged that the scheme and artifice continued in effect to and including the nineteenth day of March, 1931 (3).

After the first paragraph specifying the offense, the first count proceeds to set forth the "scheme and artifice" sought to be alleged in several parts, each part constituting what the pleader denominates "a part" or "a further part" of said scheme and artifice (3-7).

It is recited that the defendants should and did organize under the laws of Arizona, a corporation known as Clarence Saunders Stores, Inc., with a capitalization of 300,000 shares of common stock of no par value, and 15,000 shares of preferred stock of the par value of $100.00 each, for the purpose of engaging in the chain grocery store business, using the name Clarence Saunders Stores, Inc. (3); that the name of the corporation was changed successively to Arizona Clarence Saunders Stores, Inc., United Clarence Saunders Stores, Inc., and United Sanders Stores, Inc., and that the corporation was dominated at all times by the defendants; (4) that the defendant, A. E. Sanders, transferred to the corporation a franchise agreement between himself and the "Clarence Saunders Corporation," the agreement providing that A. E. Sanders should pay one-half of one per cent of the gross sales of all stores so operated by him, for the use of the trade name "Clarence Saunders," which franchise was transferred to the corporation together with an option to purchase certain stores known as the "Cashway Stores" in the City of Tucson, in consideration of the issuance to A. E. Sanders of 151,000

shares of the common stock; (4) that the sum of $151,000.00 for said franchise was set up in the books but that it had little or no value whatsoever (4).

It is further alleged that the defendants should and they did issue to the defendant, A. E. Sanders, for the sum of $1.00, 35,000 shares of the common stock, and that the defendants sold to the persons to be defrauded more than three-fifths of these shares for their own benefit; (5) that the defendants under the name "Greenbaum Brothers" and "Bond and Mortgage Corporation," did offer and sell to the persons to be defrauded, the common and preferred stock and debenture bonds of the corporation by means of false and fraudulent statements as to the financial condition of the corporation; (5) that the defendants authorized and paid, on June 29, 1929, a semi-annual, eight per cent dividend, on preferred stock, to holders of record as of April 30, 1939 (1929), when defendants knew that the corporation had been operating at a loss (5).

Then, abandoning the habitual form of allegation directed against the intent and activity of all the defendants, the indictment alleges that it was a part of the scheme that the individual defendant, H. D. Sanders, *and his associates*, without naming who the associates were, should and did, on May 15, 1929, incorporate an Arizona company under the name Piggly Wiggly Holding Corporation, the name of which was subsequently changed on February 24, 1930, to "U-Save Holding Corporation," which company was thereafter engaged in business in Los Angeles, California (6).

It is alleged to be a further part of said scheme and artifice that the said U-Save Holding Corporation should, and did acquire the majority of the common

capital stock of United Sanders Stores, Inc. (the last name assumed by the corporation in question) and then proceeded to take charge of the assets and to remove merchandise valued at more than $100,000.00 from the warehouses of the company at Phoenix, Tucson and Nogales, Arizona, and to ship the same to Los Angeles, California, without rendering just and proper compensation therefor.

The indictment charges, furthermore, that the defendants authorized and paid, in the form of a dividend, interest at the rate of eight per cent per annum, to holders of preferred capital stock of record as of December 31, 1929, with interest at said rate on all money that had been paid to the corporation on subscriptions for said preferred stock, whereas the defendants knew that the corporation had at all times been operated at a financial loss; that there was a surplus deficit of more than $144,000.00, and that said payments of dividends or interest were not made from earnings or surplus but from the capital of the company (7).

Then follows the allegation that it was further a part of said scheme, and in furtherance thereof, that the defendants, to induce persons to be defrauded, to part with money and property in the purchase of common and preferred stock and debenture bonds of the corporation, would and did unlawfully and fraudulently, make false pretenses and promises to the persons to be defrauded through and by means of conversations, letters, circulars, financial statements, newspapers and advertisements. A series of fourteen numbered paragraphs ensues, attempting to set up specific instances of alleged misrepresentation. As to each alleged false pretense it is charged that the same was untrue and that the falsity thereof was known

to the defendants. They are substantially as follows (8-12):

(1) To the effect that the business of the corporation involved was being conducted under the "guiding hand" of Clarence Saunders.

(2) To the effect that the business of the corporation was being effectively handled and substantial profits being made.

(3) That "We earnestly believe that as time goes by you will find that your investment in Clarence Saunders Stores will be one of the most profitable ever made."

(4) That, "Our common stock is now being sold at $7.50 per share, this raise being justified by the very satisfactory condition of the company which has really exceeded our expectations."

(5) That "Your Arizona Clarence Saunders Stock is not a gambling proposition. It is an investment. Through your preferred stock you are receiving 8% a year on your investment from the proceeds of all the stores and warehouses***; that your common stock will eventually surprise you by the large annual income per share you will receive from it over a long period of years."

(6) To the effect that during the ten months ending November 26, 1929, the stores then in operation had made splendid profits.

(7) That, "While this development is going on, residents of Arizona have an opportunity to become part owners of these stores and share in their splendid profits."

(8) That, "We want you to know and feel that you are a part of this company and to know that the business is being conducted on the very highest planes and to the interests of its customers and stockholders at all times."

(9) That, "We expect to open a minimum of ten new stores during the current year of 1931, without any increase in our outstanding capital. The company is in a good financial position, as will be shown by financial statement as of December 31, 1930."

(10) That, "Exchanging your investment from United Sanders Stores, Inc., to U-Save Holding Corporation, gives you a better investment than you had before, even at the time you made your original purchase. The book value of our Class A stock which we are offering in exchange for your United Sanders Stores, Inc., stock is $18.60 per share. This value should increase steadily as we expand through franchising our system and we believe that it is only a question of a few years until its selling value will be ten times what its book value is today."

(11) To the effect that stock offered for sale had no connection with the name "Sanders", but that it was strictly stock of the Clarence Saunders Co., the originator of the Piggly Wiggly Stores.

(12) To the effect that the Arizona Clarence Saunders Stores, Inc., would guarantee interest on its stock after six months, no matter what happened.

(13) To the effect that the Arizona Clarence Saunders Stores, Inc., was making large profits; that the common stock would be worth $25.00 per share within ninety days and that the company had no indebtedness.

(14) To the effect that the common stock of said corporation would soon go on the market at $10.00 per share and upwards and a $300.00 bonus would be paid on a $1000.00 debenture bond at the end of three years.

After these fourteen specifications of misrepresentation, the indictment concludes that said defendants, referring to the five originally named, on the 9th day of April, 1930, at Phoenix, Arizona, having devised the scheme and artifice set forth in the first, unnumbered paragraphs of the count, and with the intent upon their part of executing said scheme and artifice, unlawfully and feloniously did knowingly place, and cause to be placed in the Post Office establishment to the person to whom the same was directed, a letter, enclosed in an envelope, bearing United States postage in the sum of two cents, and the following return card, direction and address, to-wit: a letter addressed to one Addie Driscoll, Box 103, Douglas, Arizona, the said Addie Driscoll being one of the persons to be defrauded, as said defendants well knew, and which letter is as follows:

"Bond and Mortgage Corporation
Security Building,
Phoenix, Arizona.
April 9, 1930.

Addie Driscoll,
Box 103,
Douglas, Arizona.
Dear Madam:

"Answering your letter of April 8th, we wish to advise that the Common Stock of the United Clarence Saunders Stores, Inc. is being offered to the public through this company for $10.00 per share.

"Trusting that this is the information you desire, we are,

Yours very truly,

BOND AND MORTGAGE CORPORATION

By: (Signed) M. LOVELAND
Assistant Secretary." (13)

The foregoing first count of the indictment under which the defendants were tried was not only attacked by the separate demurrers of appellants (111-128), but its sufficiency was, as well, successively called to the attention of the Trial Judge upon formal objection made to the introduction of any evidence thereunder at the opening of the trial; (208) upon the motion for directed verdict at the close of the Government's case; (449) upon the motion for new trial, and finally, upon the motion in arrest of judgment (185, 188, 481, 482). Each of these successive attacks upon the first count of the indictment was predicated upon the same grounds, the most important of which, for the purpose of brevity and avoiding repetition, are enumerated as follows:

(1) That no crime is charged and no facts set forth constituting an offense against the laws of the United States of America;

(2) That the indictment is vague, indefinite, uncertain and incomplete and does not set forth any certain scheme or device with sufficient accuracy to inform the defendants of the offense charged against them;

(3) That the indictment is bad, in that it is guilty of duplicity, having in a single count more than one separate and distinct offense.

(14) To the effect that the common stock of said corporation would soon go on the market at $10.00 per share and upwards and a $300.00 bonus would be paid on a $1000.00 debenture bond at the end of three years.

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(2) That the indictment is vague, indefinite, uncertain and incomplete and does not set forth any certain scheme or device with sufficient accuracy to inform the defendants of the offense charged against them;

(3) That the indictment is bad, in that it is guilty of duplicity, having in a single count more than one separate and distinct offense.

Under the indictment as outlined above, A. E. Sanders and appellants were arraigned and pleaded "not guilty." H. D. Sanders, residing in El Paso, Texas, charged with serious complicity in the alleged offense, was never apprehended, and A. E. Sanders, the head of the enterprise, the affairs of which were the subject of inquiry in the proceedings below, who was separately represented by his counsel, Mr. Duane Bird, withdrew his plea of "not guilty" in the midst of the trial, pleaded "*nolo contendere*," testified as a Government witness and was awarded a suspension of sentence on parole. Appellants entered, and persisted in, their pleas of "not guilty."

THE FACTS

So involved and disjointed is the evidence of the Government by reason of the failure to proceed in a logical or chronological order, the calling and recalling and interruptions of the witnesses, that it is necessary, for the purpose of aiding the court and lightening its burden in arriving at a prompt and adequate comprehension of the facts, that a complete, if, perhaps, somewhat lengthy statement of the facts be made.

At the outset it should be noted that appellants contended below that the record made by the Government discloses, in many important particulars, an utter failure of proof, in others a wide variance between the indictment and the evidence and in others, still, the gravest of errors in the admission of dangerously prejudicial and incompetent evidence, and that, therefore, the proof, if it disclosed anything, demonstrated that they were not guilty of the offense charged. They determined, therefore, at the conclusion of the Government's case, to rest and thereupon renewed their motion for a directed verdict. All of the facts under

discussion, accordingly are based upon the Government's exhibits and upon the examination and cross-examination of its witnesses.

On October 25, 1928, the Clarence Saunders Stores, Inc., was incorporated as an Arizona corporation by the filing with the Corporation Commission of its articles of incorporation (209). The name of this company was subsequently changed, as charged in the indictment, but, for purposes of brevity and convenience, the corporation will be hereinafter referred to, unless special occasion requires the designation of its name at any particular time, as "the corporation" or "the company." The original authorized capital included 15,000 shares of eight per cent preferred stock of the par value of $100.00 each, and 300,000 shares of common stock of no par value (209). Subsequently, by amendment to the articles of incorporation, the capitalization was changed to 50,000 shares of eight per cent preferred stock, of the par value of $100.00 each, and 500,000 shares of common stock, of no par value (211). The activities of the defendants respecting this corporation constitute the basis of the alleged scheme to defraud, or, as sometimes called, "the genesis" of the offense.

The corporation was organized by the defendant, A. E. Sanders, and his associate or employee, E. B. Horne, through Mr. Sander's counsel, Mr. Duane Bird (209, 346). Appellants had nothing to do with the organization of the company (349). A. E. Sanders, testifying that Mr. Bird was representing him and not them, and that the company was organized by him (346).

Prior to the incorporation of the company, the defendant, A. E. Sanders, procured a franchise or right

to use the name "Clarence Saunders" in connection with a chain store grocery business in Arizona, which franchise was subsequently transferred to the corporation when organized. Sanders, having been sworn as a Government witness, testified that in the latter part of 1928, before the corporation was organized, he had a conference with Will Greenbaum, one of the appellants, in which the latter asked if Sanders thought he could get a concession from Clarence Saunders, after which Sanders, pursuant to arrangement made by telephone or telegraph, went to Memphis, Tennessee. Sanders said that the matter was discussed several times with appellants, but the time and place of these conversations and what was said by the parties participating therein was not disclosed, the trial court permitting, over objection, testimony of the general purport or result of conversations without requiring this or other witnesses to give the substance of what was said by the parties to any such conversation. Sanders asserted, in his direct examination, *that he and appellant, Will Greenbaum, went to Memphis, and that the said Greenbaum and he had an interview with Mr. Saunders in Memphis* and that he, Sanders, secured a franchise for Arizona and New Mexico outside of two counties, issuing to Sanders what was repeatedly referred to as a "franchise for the use of the Saunders name," after which they returned to Arizona and organized the corporation (345).

On cross-examination, the witness stated that *he did not know whether or not appellant, Will Greenbaum, made the trip as the result of which the franchise was procured,* the witness stating that as to any trip made to Memphis by Will Greenbaum, "it might have been later, I don't know that we visited Saunders

there" (352). Thereupon, the court interrupted and asked:

> "Didn't you testify a moment ago you and Mr. Greenbaum went to see Mr. Saunders before the incorporation of the company?"

And the witness replied that as to any trip which Will Greenbaum made with him, it might have been two or three months after the incorporation of the company (353).

Having procured the franchise to use the Saunders name, A. E. Sanders himself proceeded, as has been said, to organize the Arizona corporation. Parenthetically, it is of interest to note that the defendant, A. E. Sanders, prior to the organization of the company under consideration, and prior to his acquaintance with appellants, had procured the right to use the name "Piggly Wiggly" and had organized the Piggly Wiggly Southwestern Company (344) and that after the creation of the company in question, in October of 1930, without assistance or co-operation of appellants, he organized and was financing another chain of grocery stores in the State of Kansas (247).

The defendant, Sanders, and the said Horne, through Sander's counsel, Mr. Duane Bird, then obtained permission from the Arizona Corporation Commission, on behalf of the corporation, to issue and sell 1500 shares of its preferred stock, at $100.00 a share, and 50,000 shares of its common stock of no par value, at $1.00 a share, and obtained an order, also, that the corporation might pay a commission of not to exceed 20% on the sale of the stock. The application for the permit, and the permit, being Government's Exhibit 14 (221, 222), shows that an order of the Corporation Commission was also then obtained authorizing the company to issue 151,000 shares of its com-

mon stock to the defendant, A. E. Sanders, in consideration of the transfer by him to the corporation of his license and franchise to operate "Clarence Saunders Sole Owner Of My Name" food stores in Arizona and New Mexico, and of the transfer to the company of Sander's option or agreement to purchase the stores of the "Cashway Markets" in Tucson. Attached to the application for this first permit is a copy of the agreement between the defendant, Sanders, and the Clarence Saunders Corporation, granting to Sanders the right to use the Saunders name.

In the indictment, as well as throughout the trial, this license agreement is referred to as a mere concession to use the name "Clarence Saunders" and as a contract of little or no value (5) and the terms of the instrument and the rights accorded to the company by permission to operate thereunder were ignored and asserted as worthless. L. D. Null, an accountant (not certified), testified that the Saunders license agreement was of no value whatsoever (380). Null, however, said, on cross-examination: "As to the value of the franchise, I am afraid I could not answer, as I have already said, it had no value and I will have to stick to that" (385). Again he said (389): "I have never owned a grocery store or any other kind of a store **** Matters of that kind cannot be computed, but I still say the Clarence Saunders franchise was worth nothing, that is my opinion."

The license agreement provides that the licensee shall purchase from the licensor and install standard store equipment in detail under each store operated thereunder; to place a large sign as directed by the licensor on which shall appear the trade-name "CLARENCE SAUNDERS Sole Owner Of My Name." The licensee agrees to use no other name or sign in con-

junction with said trade-name and contracted to form no agreement directly or indirectly with any competitive business. After providing for weekly reports to the licensor of sales and any other phase of the business as the licensor might require, the licensee agrees to permit the licensor to inspect store premises, to pay the licensor promptly for merchandise or store equipment purchased, to establish stores under a given schedule and, finally, to pay the licensee a monthly license fee of one-half of one per cent on the gross sales of each store operated under the agreement.

The licensor agrees, upon its part, to furnish to the licensee plans and specifications for each store building, instructions as to all changes and remodeling required, designs for color scheme and trade-name, floor plans for installation of fixtures and merchandise, standard advertising copy for opening announcements and other advertising, information as a guide for the purchasing of merchandise, instructions for uniform methods of accounting and keeping of records, and most important of all, to cooperate with the licensee in increasing and maintaining sales and profits for the benefit of the licensee as well as of the licensor and all other groups or chains of stores operated under a Saunders license (227-228). There is no evidence that appellants had any connection whatsoever with the obtaining of the permit to sell the stock, with the valuation of the Saunders license agreement or of the Cashway option, fixed by the Corporation Commission at $151,000.00, or with the issuance to Sanders of 151,000 shares of no par value stock, nor is there any evidence of any kind indicating that appellants had any knowledge that the Saunders license agreement was not being performed or observed by the parties.

When the Corporation Commission of Arizona permitted the license and option agreements to be capitalized at $151,000.00, after a full disclosure of the documents, and authorized in consideration therefor, the delivery of 151,000 shares of the common stock to A. E. Sanders, the shares of stock so transferred were not required, by order of the Corporation Commission, to be placed or held in escrow (241).

Thereafter, the defendant, Sanders, by his same attorney, Mr. Duane Bird, applied for a further permit to sell shares of the company, and the permit was accordingly issued on March 22, 1929, granting permission to sell 10,000 shares of preferred stock at $100.00 a share, and 80,000 shares of no par value common at $5.00 a share (Government's Exhibit 15) (228). In Mr. Bird's application he states that the stock authorized to be sold by the preceding permit had been over subscribed, that the Tucson program had been financed and launched and that the company desired to finance the installation of fifteen stores and a warehouse in Phoenix, locations for which were being secured. A financial statement is found attached to this application showing an already existing surplus in the sum of $2389.00 (230). As to this application, also, there is no evidence of connection on the part of appellants. They did, pursuant to agreement with the corporation and with the defendant, Sanders, sell the stock and receive from time to time the commission authorized to be paid under permits issued by the Corporation Commission of Arizona.

Again, on behalf of defendant, Sanders, Mr. Bird applied for a permit to issue and sell 11,000 shares of the preferred stock of the company at $100.00 a share, and 70,000 shares of its no par common stock at $7.50 a share, upon a commission of twenty per cent. (Gov-

ernment's Exhibit 16) (231). The progress made by the corporation is disclosed by Mr. Bird's application wherein he states that "the company now has in operation six stores and a warehouse at Tucson, Arizona, and three stores and a warehouse at Phoenix, Arizona. In addition thereto another store will be opened in Tucson during this month, seven Phoenix locations are under lease and buildings are in the course of construction and should be completed within sixty days, and one location in Mesa has been secured and the store building is now being completed **** Barring unforeseen circumstances, nine additional stores will be opened by the corporation by September 1, 1929. The company will continue to open stores as rapidly as possible until its entire territory is covered" (232, 233).

A subsequent application was made and a permit issued, dated March 10, 1930, to sell 10,000 shares of common stock at $10.00 a share and to issue and sell $250,000.00 of debentures (Government's Exhibit 17) (233, 235).

On July 15, 1930, another permit was granted to issue and sell 1000 shares of no par value common, at $10.00 a share, and $20,000.00 of its debentures upon the same commission of twenty per cent (Government's Exhibit 18) (235). To the application for permit of March 10, 1930 (Government's Exhibit 17), was attached a financial statement prepared by the Government's witness, Tom H. Brandt, the Comptroller of the company. This statement, Mr. Brandt testified, was correct (332), and was not only attached to the application for the permit but was sent to trade creditors for the purpose of establishing and fortifying the credit of the company (335). The company

is now found to have grown to possess balancing assets and liabilities totaling $1,011,577.44, with cash on hand as of December 31, 1929, in the sum of $51,-326.72. Inasmuch as a further analysis of this financial statement will be necessary in the ensuing recital of the facts, it will not further be discussed at this point. Suffice here to say that this Government witness, Mr. Tom H. Brandt, testified, on cross-examination, that:

> "Mr. Gus Greenbaum had nothing whatsoever to do with the preparation of this statement *** He had nothing whatsoever to do with the entries on the books of the stores company. After the financial statement of December 31, 1929, was prepared it was handed to Mr. Gus Greenbaum as a true and correct statement of the financial condition of the company. Mr. William Greenbaum or Mr. Charles Greenbaum had nothing whatsoever to do with the preparation of that statement; nor did they have anything whatsoever to do with the books and records of the stores company, nor with the entries in such books and records." (334.)

Attached to the last application for a permit to sell the securities of the company (Government's Exhibit 18), is another financial statement showing the condition of the company on May 31, 1930, a statement, it is important to observe, prepared probably by one of the officers of the company, Mr. G. C. Partee, the secretary. The company is now found to have grown to $1,125,101.14, the assets including almost $24,-000.00 of cash, accounts receivable in the sum of over $135,000.00, merchandise and supplies in the amount of over $345,000.00, investments over $108,000.00, fixtures and equipment in the sum of more than

$163,000.00 and automotive equipment over $10,000.00 (236). These witnesses against appellants are accordingly found to have sponsored a financial statement showing a total net worth on May 31, 1930, of $966,413.88 (238).

In this connection, it should be noted, another financial statement was prepared on behalf of the company by Government witness, G. C. Partee, and approved by Government witness, Tom H. Brands, showing the financial condition of the corporation as of a date one month following the statement of May 31, 1930. The evidence for the Government discloses a special meeting of the board of directors at which the financial statement of the company as of June 30, 1930, was presented by the President (A. E. Sanders). The minutes show that it was prepared by G. C. Partee and approved by Tom H. Brandt. It was confirmed by the board of directors and ordered spread upon the minute book (Government's Exhibit 22) (248). According to this financial statement, which was certified by a Certified Public Accountant employed by the corporation, the company *is found to have a surplus of $185,392.60* (249, 250). As has been seen, it was affirmatively shown that appellants had no hand in the preparation of any of the financial statements of the company and no knowledge or control of its books and records, the entries in which, presumably, furnished the basis for the statements.

When the corporation was organized and the first permit to sell the shares of the company obtained, appellants were given the contract to handle all of the stock of the company for a twenty per cent commission (346).

Appellants first operated under the name Greenbaum Brothers and, subsequently, having organized

the Bond and Mortgage Corporation, an Arizona corporation, (214) the sale of the securities was carried on by that company in which appellants solely were interested.

As the result of appellants' efforts in the sale of the stock, and to a small extent, of the debentures of the company, the company received in cash $80.00 out of every $100.00 of the stock of the corporation sold by them to a total amount of upwards of $900,000.00. (Sometimes testified to be over $800,000.00 (349).

A. E. Sanders, having received, pursuant to the order and consent of the Corporation Commission, 151,000 shares of the common stock of the company, which were not required to be placed in escrow and no other restriction imposed, contracted to deliver to appellants a certain number of shares upon fulfillment by them of an agreed schedule of performance in the sale of the company's unissued stock (405). Sanders placed this amount, in round numbers, at 20,000 shares, but the record is not clear cut and complete upon this subject. They did not receive any of this personally owned stock until May 2, 1929, over five months after incorporation, when they received a certificate for 3850 shares. Thereafter certificates were issued and transfers made to them or to their designates, from time to time, out of the Sanders block, which appellants sold for their individual benefit. Neither of the Sanders defendants participated in the result of these sales.

There is no supporting allegation in the indictment for this evidence, that document alleging that the defendants—meaning all of them—caused 35,000 shares of common stock to be issued to A. E. Sanders in con-

sideration of the sum of $1.00, and sold more than three-fifths thereof for the benefit of all the defendants (5). As to this alleged transaction the Government's evidence disclosed that while Sanders did cause 35,000 shares of common stock to be issued to himself for services, an event in which appellants did not participate, the certificate was subsequently cancelled and the transaction nullified. There is no allegation in the indictment that appellants received excessive or concealed commissions, nor is there any allegation of a violation or evasion of the Arizona Securities Law, Sanders' stock, as has been said, being free from any escrow restrictions.

When the company was launched and the permit to sell its stock issued, appellants proceeded to offer and sell shares to the public. A. E. Sanders, in his management and control of the corporation, dealt with appellants, as the sellers of the stock, at arms length, contracting to pay a commission, receiving the proceeds of the sales and recording the transactions in the company's separate books and records (332). Appellants, both when they operated as Greenbaum Brothers and as the corporation known as the Bond and Mortgage Corporation maintained a separate office, conducted their operations separately, kept their own books and records, employed and paid their own employees and all other expenses of their individual operations (331).

A. E. Sanders, with his own employees and associates, conducted the actual operation of the merchandising business. Sanders, testifying as a Government witness said:

> "The Bond and Mortgage Corporation was not connected with our company at that time.

> * * * The name of the first corporation I testified about was 'Clarence Saunders Stores, Inc.; that company was incorporated by me through my attorney, Duane Bird. None of the Greenbaums were incorporators of that company, nor were any of them an officer or director of that company * * * * It was not in any way managed by the Greenbaums" (348).

Brandt, also, testified:

> "I knew that the affairs and management of the company was controlled by the board of directors or by Mr. Sanders as President * * * * Their (appellants) books were not kept in the warehouse, as the Bond and Mortgage Company was separate and apart from the stores company. The Bond and Mortgage Corporation had no direction or control over what entries should be made in the books of the stores company as that was exclusively under my control and direction" (331, 332).

In connection with the offer and sale of the stocks and debentures, the record discloses that certain representations were made. The indictment, it must be borne in mind, charges that the scheme and artifice alleged as having been concocted by all of the defendants, pursuant to which the letter alleged as constituting the offense under the statute was mailed, was a scheme and artifice "to defraud *and* to obtain money by means of false and fraudulent representations, pretenses and promises," the evidence in this connection falling, naturally, into two distinct channels: (1) Evidence of the representations made and (2) evidence of the falsity thereof.

Both oral and written misrepresentations were

charged as having been made. Numerous letters were written and sent through the United States mails, as to many of which appellants were the undoubted sponsors, but as to others it affirmatively appears that appellants had no connection with them whatsoever. Within a reasonable space it is impossible to quote fully from the letters and notices which went to the public and the stockholders. Typical examples of the statements made therein, however, are herewith given. Some of these letters are signed by a rubber stamp, facsimile signature, the stamp for which was, at times, openly and without any attempt at concealment, kept in appellants' office. As to such letters, however, there is no evidence that they were sent without Sanders' full knowledge and approval or that they were not sent after his actual dictation.

One of the first letters written was signed by appellant, G. B. Greenbaum, as Financial Manager of the Clarence Saunders Stores Corporation, dated January 12, 1929. After acknowledging receipt of the subscription the letter goes on to say: "You can rest assured that the company's business will always be maintained on the highest possible business methods." (Government's Exhibit 77) (319). In another letter (Government's Exhibit 45) (275) the statement appears: "You will find that your investment in Clarence Saunders Stores will be one of the most profitable ever made," and "with Clarence Saunders guiding hand over the different stores to be established under his name we can only say one thing and that is, within a few years you will find Arizona Clarence Saunders Stores the outstanding food distribution stores in the world." This letter was signed by the defendant, A. E. Sanders personally. In another letter

(Government's Exhibit 48) (276) the stockholders are told not to trade their stock "for nebulous issues of uncertain values" and cautioned not to buy stock on margin, stating that "through your preferred stock you are receiving eight per cent a year on your investment from the proceeds of the stores and warehouses," and "I believe that your common stock will eventually surprise you by the large annual income per share you will receive from it over a long period of years," and "your stores are handling an enormous business."

Again, in a letter to the stockholders (Government's Exhibit 49) (277), signed with the facsimile signature of A. E. Sanders, it is stated that the retail business has reached large proportions; that the Bond and Mortgage Corporation will hereafter handle the stock issues and recommends the purchase of additional stock from the Bond and Mortgage Corporation.

In a letter dated April 3, 1930 (Government's Exhibit 50) (278), it is said that Henry Ford advocates chain stores, that the volume of business at present has been very satisfactory and "We expect that this year will run into several millions of dollars." In another form letter of July 1, 1930 (Government's Exhibit 51) (278), it was said "that the volume of business of the stores company has increased steadily and that the stockholders personal interest in the company has been the moving factor for the splendid showing that has been made." A letter from the Bond and Mortgage Corporation, dated August 11, 1930 (Government's Exhibit 62) (295) acknowledges receipt of a subscription, congratulates the buyer and states "We believe it will prove to be more and more profitable as the years pass and the great chain of

self-service grocery stores continues to grow throughout the southwest."

Government's Exhibit 63 (296), being a letter of the Bond and Mortgage Corporation addressed to a stockholder enclosing a certificate for stock purchased, states, among other things, that "The stores were created by a genius in this particular line of merchandising. Clarence Saunders, through his wonderful merchandising methods, established the Piggly Wiggly Stores * * * * and his new stores are just as much advanced in modern merchandising as his old stores were over the old style grocery."

A form letter to stockholders, dated August 29, 1929, relates that the various stores are rapidly nearing completion; that some stores have opened; that more than 1100 people had purchased securities of the company, that each one was a satisfied purchaser and that "our common stock is now being sold at $7.50 per share, this raise being justified by the very satisfactory condition of the company which has really exceeded our expectation." (Government's Exhibit 83) (339).

Another form letter to stockholders, dated September 16, 1929, containing the mimeographed signature of A. E. Sanders, advises the stockholders that he, Sanders, attended the opening of Clarence Saunders Stores in Los Angeles, and states that the stockholders would be naturally interested to know the progress that other Saunders Stores are making not only in Arizona but in other sections of the United States; that the opening of the Los Angeles stores was the greatest ever held in the whole world, over 110,000 people actually making purchases and over 300,000 visiting the stores. The letter goes on to say that over 1200 Arizonans had invested in the Arizona

corporation and that as announced in a previous letter it is customary for successful corporations to issue certain rights and that, accordingly, the board of directors had decided to issue to the stockholders an allotment certificate. The stockholders are advised that advantage be taken of this offer. (Government's Exhibit 84) (339, 340).

Various, oral representations were also testified to as having been made. For example, one witness testified that a statement was made to the effect that the corporation was a "great company"; that they were not allowing anybody in there but people who belonged to the Masonic Order and that he would get his money back in three years or before (300). Another witness testified that she *believed* that she was told that the corporation had twenty-five stores in New Mexico and Arizona and forty in California; that they had the buildings and the fixtures paid for; that land had been purchased and within ninety days the buildings would be up and would start business (320, 321).

During their operations in the sale of the stock and debentures, Mrs. Addie Driscoll wrote to the Bond and Mortgage Corporation and she testified that, in reply (272) she received through the mails Government's Exhibit 43, (273) being a letter addressed to her and taken out of the mails at the Douglas Post Office. She said, "I am pretty sure that it was enclosed in that envelope, but wouldn't swear it is the same envelope" (272). This letter was dated April 9, 1930 and was signed "Bond and Mortgage Corporation by M. Loveland, Assistant Secretary." It is as follows:

"Bond and Mortgage Corporation
Security Building
Phoenix, Ariz.
April 9, 1930.

Addie Driscoll
Box 103,
Douglas, Arizona.

Dear Madam:

Answering your letter of April 8th, we wish to advise that the Common stock of the United Clarence Saunders Stores, Inc., is being offered to the public through this company for $10.00 per share.

Trusting that this is the information you desire, we are,
Yours very truly,

BOND AND MORTGAGE CORPORATION,
By: (Signed) M. LOVELAND,
Assistant Secretary."

This is the letter, the mailing of which constitutes the only violation charged of Section 215 of the Penal Code. It was admitted in evidence over objection. There was no identification whatsoever of the signature of "M. Loveland" to this vital exhibit.

As to many of the letters and notices introduced in evidence and read to the jury, it appeared that appellants had no connection with them and that when the same were transmitted appellants had terminated all of their activities in connection with the Sanders enterprise, Sanders testifying that the connection of appellants with his company terminated the latter part of 1930, (348) and Brandt testifying that there was little activity in the sale of stock by the end of June, 1930 (331). Sanders also stated

that appellants had nothing to do with the sale of the stock after the name was changed to "United Sanders Stores, Inc." (358.) This took place on November 1, 1930 (211).

With the advent of the unapprehended defendant, H. D. Sanders, into the enterprise, it appeared from the evidence that an entirely new situation came into being with which appellants had no connection. A notice was sent to the stockholders on October 6, 1930, signed by Mr. G. C. Partee, the Secretary of the company, and one of the Government witnesses, in which the proposed connection with the U-Save Holding Corporation is for the first time disclosed and the names of H. D. Sanders Associates revealed. The defendant, A. E. Sanders, is recited in this exhibit as the man who would have control of the Financial Department of the reorganized company. (Government's Exhibit 54) (281). Another letter was addressed to the stockholders, dated January 15, 1931, signed by H. D. Sanders, as President, and the said G. C. Partee, Secretary, and reciting that the U-Save Holding Corporation had acquired control of the common stock of the company under inquiry (Government's Exhibit 56) (289). Another instance of similar character is Government's Exhibit 53 (280), a form letter to the stockholders from Mr. A. E. Sanders, calling attention to the coming stockholders' meeting to be held November 1, 1930. Yet another of these exhibits evidencing a situation with which the appellants were shown to have no connection was received in evidence as Government's Exhibit 64 (297) also signed by the witness, G. C. Partee, reciting that in October of 1930, the U-Save Holding Corporation had purchased the control of the common stock of United Sanders Stores, Inc., and attaching a balance sheet showing a net worth of $939,944.06 (299).

One of the major charges against appellants both from the standpoint of the indictment and the evidence centered about the payment of dividends upon the preferred stock. The indictment alleged that it was a part of the scheme that the defendants should and they did authorize and pay a semi-annual dividend of eight per cent to preferred stockholders of record as of April 30, 1939 (meaning, doubtless, 1929), payment being made on June 29, 1929 (5, 6). No evidence was introduced as to the payment of any dividend in June of 1929, the Government introducing evidence of the payment of a dividend one year later, in June of 1930, an event not charged in the indictment.

Evidence was, also, introduced of the payment of a dividend upon preferred stock to holders of record as of December 31, 1929. As to this last mentioned dividend, which was the first paid, Brandt testified (329) that during the month of December, 1929, he had a conversation with A. E. Sanders in the presence of appellant, Gus Greenbaum. He said that it was so long ago that he didn't remember the details but that the substance of the conversation was that A. E. Sanders told him (Brandt) that he wanted dividend checks prepared on the preferred stock which was fully paid up and a list of credit entries on subscriptions for preferred stock which were not paid up. Brandt said that he told Sanders at the time that he didn't see how a dividend could be paid and said "We have no earnings." He testified, further, that he went into the outer office and brought in a record showing the operating loss and there was a discussion as to whether or not there was in fact a loss (330). He said "*I don't remember that Gus Greenbaum said anything at that conversation. Mr. Sanders was the one who wanted me to prepare the checks and the*

lists." The dividend was paid to the stockholders and subscribers of record on the last day of the same month at which the conversation is alleged as having taken place, i. e., December, 1929, the actual payment being made after January 1, 1930. This same witness testified that he prepared a statement of the financial condition of the company as of December 31, 1929, *the dividend date*, and delivered it to Mr. A. E. Sanders. He gave appellant, Gus Greenbaum, a number of mimeographed copies (333). He said, further, that appellant, Gus Greenbaum, had nothing whatsoever to do with the preparation of this statement or with the entries in the books of the company back of the statement (334). It was mailed to various commercial houses to build up the credit of the concern (335). *Mr. Brandt said further that the statement was true* (333). This document (Government's Exhibit 40) (335) shows that on December 31, 1929, immediately prior to the actual payment of the dividend, the company had a net worth of $884,190.46 and a *surplus of $33,780.46.* The cash on hand alone, *as shown by this exhibit of the Government* was $51,-326.72. The total current assets amounted to $373,-701.70, while the current liabilities aggregated only $117,458.33 (336). The witness stated that he could not determine from the statement itself whether it reflected a capital or earned surplus (336). That it was made up of two accounts, Capital Surplus and Earned Surplus.

The record discloses that a second dividend was paid to preferred stockholders of record as of June 30, 1930, an event, as has been said, not charged in the indictment. The same Government witness, Brandt, testified, in substance (330), that in June of 1930 he had a discussion with appellant, Gus Green-

baum, with reference to the payment of a dividend for the first six months of 1930 and he said further, "We didn't have any money to pay these checks with. Mr. Greenbaum said that they must be paid. I don't recall any other conversation, but the dividends were paid" (330). The checks referred to by the witness had been signed by A. E. Sanders before he left for Kansas. The witness testified that at the time of this conversation he showed Mr. Gus Greenbaum the "usual operating statement," which showed a loss of approximately $96,000.00 (331). *This operating statement was not introduced in evidence.* The money to pay this dividend, he said, came from a loan from appellant, Gus Greenbaum, in the amount of about $8000.00 and a payment by A. E. Sanders Company, the Piggly Wiggly Southwestern, in the amount of $7000.00. The balance of the dividend was made up from receipts from the stores (330). Dividend for 1930 totaled $25,200.02 (381).

The Government's evidence discloses that this same witness, Brandt, approved a financial statement of the company as of this dividend date, June 30, 1930, which had been prepared by another Government witness, Mr. G. C. Partee, and submitted to the defendant, A. E. Sanders. This statement was spread upon the books of the company, which was introduced in evidence as Government's Exhibit 22, and appears on pages 26 and 27 thereof (249). It discloses that on June 30, 1930, there was cash on hand and in the banks in the sum of $45,334.37; that the current assets totaled $446,272.13, while the current liabilities was only $126,965.56. *The statement shows a surplus (approved by Brandt) in the sum of $185,392.60 and is certified as correctly reflecting the financial position of the company by John W. Wagner, a Certified Public Accountant* (250).

It will be seen from the foregoing narrative of the facts that the representations constituting the alleged means of the asserted scheme to defraud may be grouped into three general classes which, in their order of probable importance, are as follows:

(1) The payment of dividends out of capital and not out of earned surplus.

(2) The representations as to the progress and condition of the company and the prospective value of its stock.

(3) The representations to the effect that the corporation was in some manner under the guiding hand of the original Clarence Saunders.

Having introduced evidence of the representations and the payment of dividends, the Government next sought to prove falsity by demonstrating the true condition. For this purpose one L. D. Null, was called as a witness and testified that some time before, and in connection with another matter, he had made an examination of the books and records of the corporation from which he prepared profit and loss statements of the company for the year 1929 and for the nine months of the year 1930 ending September 30th, which were, over objection, introduced in evidence as Government's Exhibits 89 and 90, respectively (366, 374). These statements purported to disclose an operating loss for the year 1929 of $108,885.42 and a net loss to surplus for the first nine months of the year 1930 in the sum of $56,045.19.

The objection of appellants and their subsequent motion to strike these exhibits from the record, in addition to the motions for directed verdict and the formal motions thereafter, was based upon the

grounds that sufficient opportunity had not been accorded appellants to examine the underlying sources from which these profit and loss statements were made; that the books and records which underlay the statements had not been introduced in evidence; that there had not been a proper identification of such books and records as were present in court in the possession of the Government; that there had been no attempt to produce the people who made the entries or anyone having personal knowledge of the facts, there having been no showing that such persons were dead or otherwise unavailable; that there was no sufficient testimony as to the correctness or regularity of the entries from which these statements were compiled; that the original entries were not even present in court; that the books and records were shown to be incomplete; that there was no showing that appellants had anything to do with the books and records underlying the statements which made these exhibits pure hearsay as to appellants, and that they were not the best evidence (367).

Certain of the books of account of the company were marked for identification as Government's Exhibits 34 to 39, inclusive. These books so marked for identification were: a record of cash and disbursements; the cash receipt record; the record of cash receipts from September 1, 1930 to October 1, 1930; the journal register; the record of stock sales and subscription agreements; and the general ledger of the company (255, 259). There was no identification of these books or testimony as to their correctness or regularity for the period prior to September 15, 1929 (251) although at the time of Mr. Bird's second application for a permit to sell the company's stock, on March 19, 1929, the stock authorized to be sold

by the first permit had been over-subscribed and the Tucson program financed and launched. By this time the company had acquired assets and liabilities (229, 230). G. C. Partee succeeded Brandt as bookkeeper and auditor and supervised the entries from August, 1930, to "about October, 1930" (258). There was no identification of the books and records, therefore, for the period commencing with the incorporation of the company on October 25, 1928 (209) to September 15, 1929, the first ten months' period of the existence of the corporation, and no identification for the period after an indeterminate date in October of 1930, thus disclosing a tacit admission by the government that from October 1930 on, appellants were not associated with the enterprise. Both Brandt and Partee testified that all of the books and records of the company which underlay the Null summaries were not present in court, Brandt testifying, among other things (252):

> "I have examined the books and will say that the accounts of the company that eventually blend into the general ledger are missing—This book, such as checks, vouchers and bills rendered. They are not here. Neither is the payroll and the detailed information that is accumulated through your journal and cash records, such as substantiates these records. These records are not here."

Partee said:

> "These are not all the books that were kept by the company. * * * *"

After mentioning the stock ledger, transfer record, etc., he said:

> "There are other books that are not here, such as accounts receivable and the accounts payable,

> and the detail record of the operation of the various stores and things like that. No inventories are available here * * * The detailed operating records were kept in permanent form I would say * * * monthly trial balances were made throughout the time I was with the company up to the time the books were taken to Los Angeles. None of those are here, nor are they in these books I have just examined (meaning Government's Exhibits 34 to 39, inclusive, for identification). There were several operating books in which the operating accounts were kept, which I could not name at the present time but they are not here" (259, 260).

Null himself stated that he examined not only the books which were identified but never introduced in evidence, but many other records, probably, he said, "hundreds of documents" (363). The work, done in connection with another matter appertaining to the receivership of the corporation, consumed one hundred eighty-five or one hundred eighty-six days of his own time, one hundred sixty-six days of his partner, Mr. Woods' time and one hundred fifty-nine days of Mr. Bradford's and fifty-two days of Mr. Ray's time (362). Furthermore, he stated, in order to check and verify the profit and loss statements offered in evidence (Exhibits 89 and 90) "a tremendous amount of work would be necessary" (362). "If you employed," he said, "an accountant it would take two or three weeks at least, and maybe longer" (363). Later he said "To examine the books and records which underlie the tendered profit and loss statement I would say it took three men about four or six weeks. It would take one man about eighteen weeks" (364).

Testifying as to Government's Exhibit 90, Mr. Null said: "I would not assume that the books and records

on the table are sufficient underlying data to make up a verified profit and loss statement from. In other words, in order to verify, I would say certify, to that statement as to its true and correct condition, those books are not sufficient" (369). It appeared that one of the exhibits (Exhibit 91) was compiled from the books which were in court "on the table" (369), and the witness was able to state that the exhibits were correct, not because, however, they could be verified from "the books on the table," but because of a detailed examination not only of the books present but of hundreds of other records and documents. He said *"It is because of my previous acquaintance with the other books and records that are not here that I am able to prepare this tendered statement."*

During the trial and the examination of Mr. Null, the government admitted that the records identified and in court were but *summaries* of original entry books. Mr. Null had stated that it was because of his previous acquaintance with the other books and records which were not in court that he was able to prepare the tendered statements (370). In a motion to strike this statement, the following passage took place between Mr. Dougherty, of counsel for the Government, and the Court:

> "MR. DOUGHERTY: I ask that the answer be stricken because he has already answered the question.
>
> THE COURT: It may be stricken.
>
> MR. DOUGHERTY: On the ground that the witness did not say what counsel put in his mouth or attempted to put in his mouth. He said that this profit and loss was compiled from those

books on the table and these books on the table he has testified IS A SUMMARY of his examination of all the books.

THE COURT: You don't mean that?

MR. DOUGHERTY: These books ARE A SUMMARY, your Honor, of the original entry, books (370).

The witness thereupon repeated that he could prepare these exhibits from the general ledger that was on the table *because he had already examined other books and records which were not in court* (371).

To prove the financial condition of the company on and prior to the date of the alleged commission of the offense the Government offered, and there was introduced in evidence, Exhibit 91 (378) which purports to be a general balance sheet as of September 30, 1930, a period approximately six months after the date of the commission of the offense charged; to the admission of which appellants objected, and the document was subsequently moved to be stricken upon similar grounds urged to the introduction of Exhibits 89 and 90. It should be noted that this exhibit, which was prepared the evening before it was offered, contains the wholly inadmissible item, "Net worth *September 30, 1934*, $1,066,636.03." Mr. Null testified that there was a deficit of $679,000.00 (380). The exhibit itself discloses a deficit of $215,-378.47 (378). To arrive at the larger deficit, Mr. Null computed the Saunders franchise or license agreement as of no value, the organization expense as of no value, and deducted, as a liability, the common stock outstanding of no par value in the amount of $405,014.50. In the preparation of the statement, however, Mr. Null included organization expense as

an asset in the sum of $304,644.88. This "expert" had some difficulty, apparently, with his addition because he stated that adding this figure of $304,644.88 to the deficit shown in the exhibit, $215,378.47 would create a deficit of about $679,000.00, missing by approximately $8000.00.

In the preparation of the purported balance sheet of September 30, 1930, (Government's Exhibit 91) and the incident determination of the value of the fixed assets, Mr. Null stated that it was necessary for him to refer to the general audit made at the time of the appointment of the receiver for the company in the state court, and he stated he could still prepare it but he "would not vouch for the accuracy of that balance sheet in the absence of the missing books and in the absence of my experience in the first audit" (383). He stated further, "I said that the franchise in question had no value whatsoever but I *couldn't answer* the question as to whether or not the franchise would have a value at the time of the original entry setting it up in the books was made. I would say that the franchise had no value on September 30, 1930 * * * * because the company was not operating under it" on that date (384).

As the case approached its termination, Brandt, whose testimony on behalf of the Government covers one hundred forty-six typewritten pages, and approximately sixty-three pages of the printed Bill of Exceptions, was recalled for the purpose of identifying certain exhibits, the total purport of which was to show that appellants had received from the defendant, A. E. Sanders, and sold some of Sanders personally owned common stock. He had testified that for the period of his employment, the books and records underlying the Null summaries were true and correct,

saying, "During all of the time I was in charge of the books of the company I truly and accurately kept the accounts" (415). On cross-examination he admitted one large item of $5000.00 to be a fictitious and false entry. He said, in part, "I knew of a shortage of accounts at the Sanders Stores while I was Comptroller *** I will testify to the statement a while ago that there was a three-cornered deal to be repaid by the Kansas unit (with which appellants had no connection) in that I called it a shortage. It was *not* subsequently made good by the Kansas unit *** (417). *Under the promise of A. E. Sanders in Kansas to get funds here I made a fictitious entry* and I showed it as a check to the Phoenix Packing Company for $5000.00, and on the duplicate voucher I showed a charge against the Kansas unit, and put $4400.00 in the Citizens State Bank at Five Points because on June 30th we had to make a return to the Corporation Commission on the sale of stock (with which appellants had no connection) and it required that the money be put up there" (418).

Counsel for appellants thereupon endeavored to show that as to at least $2500.00 of this $5000.00 item, Brandt was an embezzler, and to this end offered in evidence as defendants' Exhibits, four checks marked Defendants' Exhibits F for identification (422, 423). Having deposited $5000.00 of the corporation's funds to the account of the Phoenix Packing Company in the Valley Bank, Brandt proceeded to draw and sign the checks, one dated July 24, 1930, in the sum of $500.00, another dated July 1, 1930, in the sum of $500.00, another dated July 24, 1930, in the sum of $100.00 and another dated July 2, 1930, in the sum of $2000.00, all to his own order. Each

of the checks showed that they were paid upon endorsement by Tom H. Brandt.

Appellants also offered in evidence as Defendants' Exhibit E, a document, so marked for identification, being a statement of Tom H. Brandt made on August 11, 1930, consisting of eleven typewritten pages in which this witness admitted that he took $5000.00 from the United Clarence Saunders Stores, Inc., deposited it to the account of the Phoenix Packing Company, from which he checked out $2500.00 to himself (419), although he had stated, under oath, on the trial, "I didn't say that I had taken some of the Phoenix Packing Company money which I got from Sanders Stores and put it to my own account, and I didn't do that" (417). He also admitted that he did not resign but that he was discharged at the time the embezzlement was discovered.

The court conceded that the witness had testified that one of the entries in the books was fictitious but refused to permit appellants to impeach Brandt and demonstrate his dishonesty. The court said, "This witness has testified that one of the entries in that book is fictitious. It strikes me that satisfies your inquiry" (425).

Appellants then made an avowal, offering to prove that, if permitted to cross-examine Brandt, he would testify that, in the presence of the persons named in his typewritten confession, he would say that he did state to them that there was a shortage of $5000.00 in the account of the corporation; that he was responsible for the shortage and that out of that sum he had checked out $2500.00 for his own personal use by means of the device of depositing a check of the company to the account of the Phoenix Packing Com-

pany and drawing upon those funds for his own benefit (425, 426). The Government's objection to the avowal was sustained.

Thereafter, Mr. L. D. Null was recalled for further cross-examination and repeated what he had stated previously that there were only a few missing items or missing accounts in the books of the corporation when they came to him for examination, and said further that Mr. Walter A. Wood was his partner. Appellants then offered in evidence Exhibit G for identitfication, which was an application of Mr. Walter A. Wood for auditor's fees in connection with an audit made of United Clarence Saunders Stores, Inc., for the purposes of a case pending in the Superior Court of Maricopa County, Arizona. The objection to the exhibit was sustained. In the application so tendered as an exhibit, Mr. Wood stated in effect, that a large part of the books and records of the company were so incomplete that "your auditor was required, in ordere to reach a satisfactory and accurate conclusion, to rebuild many of the voluminous transactions carried by said defendants from extraneous material" (430).

The objection of the Government being sustained upon the ground that the exhibit was prepared by someone not a witness, Mr. Null, resuming his testimony, said that there were a few missing matters of no great importance. And he testified, "It is not true that a large part of the books and records of the stores were so incomplete that the auditors were required in order to reach a satisfactory and accurate conclusion to rebuild many voluminous transactions carried on by the corporation" (431).

After the Government witness, Brandt, had testi-

fied to the false entry alluded to, and had made the admissions hereinbefore set forth, and after Null had testified that it had taken over five hundred man-days to examine the books of the corporation and that he examined literally hundreds of records and documents but that, nevertheless, there were only a few missing items in the books of the company, the Government proceeded to call Roy N. Davidson, acting Collector of Internal Revenue for the District of Arizona, for the purpose of introducing income tax information showing that the company had suffered operating losses during the years 1929 and 1930, but the witness refused to testify as to any records in his possession under regulations or instructions of the Government. Thereafter the witness testified that the only records that he had in his office were *card records of the filing of the returns.*

He said *he did not have the returns or copies thereof* and that the same were in Washington (432).

At the court's suggestion the defendant, A. E. Sanders, was placed upon the witness stand for the purpose of consenting, on behalf of the taxpayer, to the introduction of these cards in evidence, and when it appeared that Sanders was not, at the time of his testimony, the President of the company, the court said, "That leaves us in another embarrassing position" (435).

On the following day Mr. Davidson took the witness stand and stated that he then had authority to testify in regard to the records as shown by his records of the corporation under consideration. This authority was in the form of a telegram "authorizing the acting Collector of Internal Revenue at Phoenix, Arizona, to testify with reference to income tax return of the

company for the years 1929 and 1930." The telegram was signed "Helvering, Commr" (437). Over the objection of the defendants, the telegram was admitted in evidence.

The Government then proffered, and there was received in evidence, Exhibits 109 and 110 (442, 446) which the witness stated were instruments constituting the permanent records kept in the regular order of business in his office.

As to Government's Exhibit 109, there is no supporting data, and without any information called for and contemplated by, the card itself, as to capital stock, indebtedness, etc., in the column under the year 1929, there is a figure, after the words "Gross Income," $125,588.45, and after the words "Net Income appears," for the same year, "loss $150,271.53" (442).

As to Government's Exhibit 110, the income tax card for the year 1930, none of the blanks are attempted to be filled excepting an item after the words "Gross Income" $306,054.21, and after the words "Net Income" loss $135,626.67 (446).

On his voir dire examination Mr. Davidson said that he did not know whether the entries thereon were correct of his own knowledge; that the original income tax returns he presumed were in Washington and that while he knew the entries were made by one Mr. Cornish, who was dead, under his general charge of the office, he didn't know anything about the entries himself, whether they were true and correct nor whether they were correctly copied from the original tax returns. He stated further that he didn't know who signed the original income tax returns (438, 441). The court said, "*There is no doubt but that the*

return itself would be the best evidence" (440) but, nevertheless, the documents were received in evidence over the particularized objection of appellants.

With the introduction of these income tax cards the Government rested.

Appellants thereupon moved the court to strike each of the Government's exhibits, objection to which had theretofore been made, and to instruct the jury to disregard them and the evidence in connection therewith. The motion was denied (449).

Then appellants moved for a directed verdict finding them not guilty, and after the deniel of that motion the defendants rested and the Government rested. The motion for directed verdict was renewed by appellants at the close of all the evidence upon grounds identical with those urged in the motion made at the close of the Government's case (449-455).

The court instructed the jury at considerable length, after which a verdict of guilty was returned as to each of appellants (183-184). Motions for new trial and in arrest of judgment having been made and overruled (185-193), the Honorable F. C. Jacobs as the Judge presiding, suspended the imposition of judgment and sentence as to the defendant, A. E. Sanders, who had pleaded *nolo contendere*, and sentenced each of appellants to imprisonment for the term of four years from December 11, 1934.

QUESTIONS PRESENTED

From the record of the proceedings the following questions are presented:

(1) Is the indictment fatally defective? This ques-

tion was raised by appellants' separate demurrers and motions to quash (101, 111, 116, 122, 129).

(2) Were Goverment's Exhibits 89, 90 and 91, the financial statements prepared by L. D. Null, admissible or inadmissible? This question was raised by objection to the introduction of the exhibits (375, 379) by motion to strike (449), by the motions for directed verdict (449) and by the formal motions after verdict.

(3) Were Government's Exhibits 109 and 110, the income tax cards, admissible or inadmissible? This question was raised by objection to the introduction of these exhibits in evidence (443, 447) by motion to strike (449), by the motions for directed verdict (449) and by the formal motions after verdict.

(4) Was the cross-examination of Tom H. Brandt unduly restricted and appellants erroneously prevented from further demonstrating the untrustworthiness of this witness whose testimony was essential to the Government's case? This question was raised by avowal (425), and by the offer and refusal of Defendants' Exhibit E (418) and F (422, 423) for identification.

(5) Did the Government fail to prove by any competent evidence whatsoever certain material allegations of the indictment, and the Court therefore err, upon additional grounds, in overruling appellants' motions for directed verdict? This question was raised by the motions for directed verdict (449), and the formal motions after verdict.

(6) Did the Government not only plead but attempt to prove, by the introduction of evidence, two distinct

schemes to defraud, as to one of which appellants had no connection? This question was raised by motion at the opening of the trial (208), by objection to the introduction in evidence of testimony and exhibits appertaining to the H. D. Sanders operation (221), by the motions for directed verdict (449) and by the formal motions after verdict.

(7) Did the evidence, instead of proving the offense as laid in the indictment, affirmatively disclose that there was no combination in unlawful intent or activity on the part of the defendants? This question was raised by the motions for directed verdict (449), and by the formal motions made thereafter.

(8) Did the court err in instructing the jury? The instructions complained of were attacked by objection and exception (480).

SPECIFICATION OF ERRORS RELIED UPON

Although other errors are assigned, appellants will urge a reversal of this cause upon the following specification of errors:

1. The Court erred in overruling the separate demurrers of appellants to the first count in the indictment, for the following reasons, to-wit:

(a) Because the first count of the indictment fails to set forth facts sufficient to constitute an offense against the United States of America under Section 215 of the Criminal Code of the United States of America (Section 338, Title 18, U.S.C.A.) or under any other law or statute of the United States of America.

(b) Because the first count of the indictment is vague, indefinite, uncertain and incomplete.

(c) Because the first count of the indictment is duplicitious and multifarious, in that it charges more than one scheme or artifice to defraud, and more than one offense in violation of Section 1024 of the Revised Statutes of the United States (Section 557, Title 18, U.S.C.A.). (Assignment of Error II.)

2. The Court erred in denying the motion of appellants made at the close of the Government's case and again made at the close of all of the evidence, that the court direct the jury in said cause to return a verdict for appellants finding them not guilty on the ground and for the reason that there was no substantial competent evidence to sustain the charge made in the first count of the indictment and upon the further grounds, to-wit:

(a) That there was no competent or substantial evidence to show that the defendants named in the first count in the indictment devised or intended to devise a scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations and promises as charged therein.

(b) That there was no competent or substantial evidence to show that the representations and promises charged as being made by appellants were false and fraudulent, as charged.

(c) That there was no competent or substantial evidence to show appellants mailed or caused to be mailed the letter set forth in count 1 of the indictment (Assignment of Errors III and IV).

3. The Court erred in denying appellants' motion to direct the jury to return a verdict, finding them not guilty, at the close of all the evidence, for the reason

that the evidence introduced by the plaintiff, United States of America, in attempted support of the allegations contained in the first count of the indictment constituted a material variance from the charge made in the first count of the indictment, in this, to-wit:

(a) That the first count of the indictment charged that appellants sold to the persons to be defrauded more than three-fifths of the 35,000 shares of common stock issued and sold to the defendant, A. E. Sanders, whereas the evidence showed that the stock sold by appellants came from the 151,000 shares of common stock issued to A. E. Sanders pursuant to a permit of the Arizona Corporation Commission.

(b) That the first count of the indictment charged that appellants authorized and paid a semi-annual dividend on June 29, 1929, whereas there was no evidence of any such dividend being paid, but the evidence related to a dividend of July 30, 1930.

(c) That the first count of the indictment charged, as a further part of said scheme and artifice, that H. D. Sanders and his associates organized and incorporated the Piggly Wiggly Holding Corporation, afterwards changed to the U-Save Holding Corporation, whereas the evidence shows that appellants had no act or part in said transaction and were not connected therewith in any way.

(d) That the first count of the indictment charged that the U-Save Holding Corporation took charge of the assets of the United Clarence Saunders Stores, Inc., and removed $100,000.00 worth of merchandise from Arizona to Los Angeles, whereas the evidence showed that appellants had no act or part in said transaction.

(e) That the first count of the indictment charged that the letter to Addie Driscoll was mailed for the purpose and with the intent on the part of appellants of executing the scheme and artifice, whereas the evidence shows that the scheme to defraud as to Addie Driscoll was fully executed prior to the time the crime is alleged to have been committed, to-wit, April 9, 1930 (Assignment of Error V).

4. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 89, which is in full substance as follows:

UNITED SANDERS STORES, INC.

STATEMENT OF PROFIT AND LOSS			Year 1929
Grocery Sales		816,695.36	
Market Sales		179,709.22	
Gross Sales			996,404.58
Merchandise Purchased		1,103,646.32	
Less Inventiory December 31, 1929		250,726.77	
Cost of Goods Sold			852,919.55
Gross Profit			143,485.03
Less Operating Expense:			
(Detail of Items omitted (366)			262,190.62
NET LOSS ON SALES			118,705.59
Plus Other Expense:			
Interest	3,473.61		
Unclassified Losses	1,531.42		
Loss on Bad Checks	811.87		
		5,816.90	
Less Miscellaneous Gains:			
Earned Discount	9,315.75		
Unclassified Gains	6,321.32	15,637.07	9,820.17
Total Operating Loss			$108,885.42
Analysis of Surplus Account:			
Operating Loss for 1929			$108,885.42
Payment of Dividend on Preferred Stock			25,743.16
Amortization of Organization Expense			10,000.00
TOTAL SURPLUS DEFICIT			$144,628.58

for the following reasons:

(a) That sufficient opportunity had not been accorded appellants to examine the sources from which said profit and loss statement was made.

(b) That the books, records, data and memoranda that underlie said statement had not been introduced in evidence.

(c) That there had been no proper identification of the books and records that were in court.

(d) That there was no attempt to produce the people who made the entries, or anyone having personal knowledge of the facts, and that there had been no showing that such persons were dead, insane, or beyond the reach of process of the court, and that they were not available.

(e) That there was no underlying testimony as to the correctness or regularity of the entries from which said profit and loss statement was compiled.

(f) That the original entries were not in court and the books and records were shown to be not complete.

(g) That said profit and loss statement was not the best evidence.

(h) That said profit and loss statement was hearsay as to appellants. (Assignment of Error XI.)

5. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 90, which is in full substance as follows, to-wit:

UNITED SANDERS STORES, INC.

PROFIT AND LOSS STATEMENT NINE MONTHS ENDED 9/30/30

Sales			
Retail Grocery		$1,029,675.94	
Retail Meats		293,921.72	
Wholesale		351,033.80	
Total Sales			$1,674,631.46
Cost of Sales			
Retail Grocery		842,076.42	
Retail Meats		223,654.48	
Wholesale		331,294.54	
Total Cost of Sales			1,397,025.44
Gross Profit from Sale			277,606.02
Expenses:			
(Detail of Items omitted) (374)			332,172.57
Net Loss Before Other Income & Expense			54,566.55
Other Income			
Interest	161.51		
Discount	8,492.75		
Freight & Delivery	460.32	9,114.58	
Other Expenses			
Cash Discount allowed	571.34		
Interest Paid Miscl.	2,196.55		
Interest Paid Bonds	2,917.15		
P & L Items	3,779.64		
Cash Short	1,128.54	10,593.22	1,478.64
Net Loss to Surplus			56,045.19
Profit & Loss Items			
Loss in Merchandise Inventory		5,678.65	
Miscl. Items		67.29	
		5,745.94	
Less: Sundry Credits		2,066.30	
		3,779.64	

for the same reasons set forth in the preceding specification number 4. (Assignment Error XII.)

6. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 91, which is in words and figures as follows, to-wit:

UNITED SANDERS STORES, INC.
BALANCE SHEET—September 30, 1931 (1930)

Assets		
Current Assets		
Cash in Bank	1,686.81	
Cash & Imprest Funds	7,225.00	
Accts. Receivable	25,658.82	
Merchandise Inventory	299,782.45	
Stock Subscription Receivable	91,657.95	
Total Current Assets		426,012.03
Investments		
Misel. Stocks & Bonds	4,617.29	
United Sanders Debenture Bonds	80,000.00	
Piggly Wiggly Southwest Co.	143,880.00	
Total Investments		228,497.29
Fixed Assets		
Fixtures & Equipment	198,899.26	
Less: Allowance for Depreciation	30,355.98	
Residual Value		168,543.28
Deferred Items		
Supplies on Hand	1,579.59	
Prepair Expense	16,959.70	
Recoverable Deposits	2,471.16	
Organization Expense	304,644.88	
Total Deferred Items		325,655.33
Concessions		151,000.00
		1,299,707.93
Current Liabilities—Liabilities & Net Worth or Capital		
Bank Overdraft	12,456.32	
Piggly Wiggly Southwest Co.	8,774.70	
Accounts Payable	28,396.62	
Accrued Payroll	3,178.00	
Notes Payable	18,156.77	
Contracts Payable	3,209.49	
Total Current Liabilities		74,171.90
Fixed Liabilities		
Bond or Debentures		158,900.00
Total Liabilities		233,071.90
Capital and Surplus:		
Preferred Stock Issued and Outstanding	877,000.00	
Common Stock Issued and Outstanding	405,014.50	
Total Capital Stock	1,282,014.50	
Deficit	215,378.47	
Net Worth September 30, 1934		1,066,636.03

for the same reasons set forth in the preceding specifications numbered 4 and 5. (Assignment of Error XIII.)

7. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America,

over the objection and exception of appellants, Government's Exhibit 109, a document headed — "INCOME TAX, Ariz. Clarence Saunders Stores, Tucson, Arizona"—being Treasury Department, U. S. Internal Revenue, Form 649, Revised Sept. 1926, (for corporations), which is in full substance as follows:

(Date of Organization)	(Name of President)
10/25/28	?
(State in Which Organized)	(Name of Treasurer)
Ariz.	?

	1928	1929	1930
Return filed	3/15/29	2/25/30	
List (month-year)	851.11		
List (page-line)		85 217	
Gross Income	$	$125,588.45	$
Net Income	Loss None	150,271.53	See card United Sanders Stores, Inc.

for the following reasons:

(a) That it is not the best evidence.

(b) That it is hearsay as to appellants.

(c) That the document is not signed by anyone and shows on its face that it is not complete.

(d) That there was no foundation laid for the introduction of the document.

(e) That there was no opportunity afforded appellants to examine the person who made the entries on the document, or to cross-examine the person who made the original income tax return.

(f) That there was no showing as to who signed the original income tax returns.

(g) That the original income tax returns were in the custody of the Government and under the Act of Congress (February 24, 1919) were available as pri-

mary original evidence. (Assignment of error XV.)

8. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 110, a document headed — "INCOME TAX, United Sanders Stores, Inc. (formerly Ariz. Clarence Saunders Stores), 305 So. 2nd Ave., Phoenix, Ariz." being Treasury Department, U. S. Internal Revenue, Form 649, Revised Sept. 1926, (for corporations), which is in full substance, as follows:

(Date of Organization) Nov. 23, 1928 — (Name of President)

(State in Which Organized) Arizona — (Name of Treasurer) Geo. J. Erhart, Receiver

FINAL (Remarks)

	1930	1931	1932
Return filed	3-16-31	10-3-1932	3-20-33
List (month-year)	86 349	86 644	86 263
List (page-line)			
Gross Income	306,054.21		
Net Income Loss	135,626.67		
			Out of business Final
Total Tax	none		

In receivership and process of liquidation

for the same reasons set forth in preceding specification number 7 (Assignment of Error XVI).

9. The Court erred in sustaining an objection of the plaintiff, United States of America, over the exception of appellants, to an offer of proof by appellants, in full substance as follows:

> At this time the defendants, Greenbaum, and each of them, avow that the witness, Brandt, would testify that at such conference and in the

presence of the persons named, he did state to them that there was a shortage of $5,000.00 in the account of the United Clarence Saunders Stores, and that he was responsible for the shortage, and that out of the $5,000.00 by him taken from the United Clarence Saunders Stores, he had checked out the sum of $2,500.00 for his own personal use, in separate checks, and if asked how this shortage of funds from the Stores Company was effectuated or consummated, would testify in response thereto that checks of the Stores Company were made up in duplicate, and that the original check figuring in this transaction, that is, the check of $5,000.00 in its original form showed payable to the Phoenix Packing Company, but that the duplicate check showed United Clarence Saunders Stores, and that the explanation on the duplicate check was was that the sum of $5,000.00 had been advanced to the Kansas unit, and that accordingly the books of account of the Sanders Stores here showed an entry or a charge of $5,000.00 as organization and development expense, when in truth and in fact such entry was false and was but a device to cover up the speculation or embezzlement of the witness, Brandt. We avow that if permitted to ask the witness, Brandt, as to the time in which he took $5,000.00 of the Stores Company's money for his own personal use, he would state it was taken around about the 26th or 27th of June, 1930, in the form of check on the Saunders Stores, signed by himself, drawn upon the First National Bank of Phoenix and that the withdrawal was charged against the Kansas unit to organization and development expenses. We will avow if permitted to ask the witness Brandt what disposition was made by

him of the money withdrawn from the Saunders Stores he would testify that he deposited $2,000.00 of that embezzled sum in the Commercial National Bank of Phoenix, and that he afterwards withdrew from the Commercial Bank from time to time the sum in question, and that he subsequently deposited $1,000.00 of the funds so taken from the Stores Company to his personal account in the First National Bank, and that the money so taken by him through the scheme was used for his own personal use, and that it was covered up by a fictitious entry in the books of the company, and we avow further that it can be developed through this witness that many of the books and records of the company were kept by him at his own home, and not at the company office, for the purpose of concealing these transactions, which books and records are not now present in court.

for the reasons:

(a) That appellants should have been allowed to test the credibility of the witness.

(b) That such evidence offered would tend to show that the books and records of the corporation were incorrect (Assignment of Error XXV).

10. The Court erred, over the exception of appellants, in refusing to admit in evidence appellants' Exhibit "F" for identification, consisting of four checks, said checks being offered for the purpose of impeaching the witness, Tom H. Brandt, and further establishing that the books and records of said corporation, Government's Exhibits 34 to 39 for identification, both inclusive, did not correctly set forth

the transactions of said corporation, which said checks are in full substance as follows:

Check No. 16, of the Phoenix Packing Company, drawn on The Valley Bank of Pohenix, Arizona, dated Phoenix, Arizona, 7/1/1930, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $500.00, and endorsed "Tom H. Brandt," showing payment thereof on July 1, 1930.

Unnumbered check of the Phoenix Packing Company, drawn on The Valley Bank of Phoenix, Arizona, 7/2/1930, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $2,000.00, and endorsed "Tom H. Brandt," showing payment thereof on July 3, 1930.

Check No. 41, of the Phoenix Packing Company, drawn on The Valley Bank of Phoenix, Arizona, dated Phoenix, Arizona, 7/2/1930, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $500.00, and endorsed "Tom H. Brandt," showing payment thereof on July 25, 1930.

Check No. 42, of the Phoenix Packing Company, drawn on The Valley Bank of Phoenix, Arizona, dated Phoenix, Arizona, 7/24/30, signed by Tom H. Brandt as Secy-Treas., payable to the order of Tom H. Brandt, in the sum of $100.00 and endorsed "Tom H. Brandt," showing payment thereof on July 24, 1930.

(Assignment of error XXVI) (422, 423.)

11. The Court erred in admitting in evidence in

behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 5, being a document which in full substance is as follows:

> Articles of Incorporation of Piggly Wiggly Holding Corporation of Yuma, dated April 27, 1929, and filed in the office of the Arizona Corporation Commission on May 15, 1929, at the request of Wm. H. Westover, of Yuma, Arizona. Incorporators: H. D. Sanders and S. I. Haley, both of Yuma, Arizona. Authorized Capital stock: 60,000 shares of Class A common and 60,000 shares of Class B Common, both without nominal or par value, and 40,000 shares of preferred stock at $100.00 each. Provides for 7% annual dividends on preferred stock. Officers named in articles of incorporation: H. D. Sanders, President and Director; Philip Thorp, Vice-President and Director; S. I. Haley, Secretary-Treasurer and Director. Principal Business: To own and operate retail mercantile stores at such places as the company may deem proper, etc.

for the reason that appellants were not shown to have any connection or relation with said Piggly Wiggly Holding Corporation of Yuma, and that such document as to appellants was hearsay. (Assignment of error VI.)

12. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 6, a document which in full substance is as follows:

> Certificate of Amendment of Articles of In-

corporation of Piggly Wiggly Holding Corporation of Yuma, dated February 19, 1930, filed in the office of the Arizona Corporation Commission at the request of Wm. H. Westover of Yuma, Arizona, on February 24, 1930. Certificate signed by H. D. Sanders and S. I. Haley. The purpose of the certificate was to change the name of the corporation to "U-Save Holding Corporation."

for the reason that appellants were not shown to have any connection or relation with said Piggly Wiggly Holding Corporation of Yuma, and that such document as to appellants was hearsay. (Assignment of error VII) (VI.)

13. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 13, a document which in full substance is as follows:

Annual Report of U-Save Holding Corporation (formerly Piggly Wiggly Holding Corporation) at the close of business June 30, 1930, executed and sworn to in Yuma County, Arizona, by H. D. Sanders, as President, and S. Idelle Haley, as Secretary, July 22, 1930; filed in the office of the Arizona Corporation Commission July 23, 1930, at the request of Piggly Wiggly Yuma Co. shows:

Assets	$956,662.59
Liabilities	9,915.47
Accumulations	504,767.22
Amount of Capital Stock Paid up and Issued	337,070.00
Stock Contracts	104,910.00

Real Porperty Owned:

Situate—Yuma, Ariz.	42,927.21
San Diego, Cal.	1,300.00
Somerton, Ariz.	5,000.00
El Centro, Calif.	21,179.68

Personal Property—Situate:

Yuma, Arizona: Stock fixtures & merchandise	7,177.47
Warehouse equipment and merchandise	87,445.81
Piggly Wiggly stock	130,695.00
Imperial, California:	
Store: fixtures & merchandise	9,506.43

Officers, in addition to the President and Secretary, are given: Vice-Presidents, Philip H. Thorp and C. L. Patterson. The addresses of all officers are given as Yuma, Arizona, except Philip H. Thorp, whose address is given as San Bernardino, California.

for the reason that there was no connection shown between U-Save Holding Corporation and appellants, and for the further reason that appellants are not charged in the first count of the indictment with having had any connection with said corporation. (Assignment of error X.)

14. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 43, which is in words and figures as follows, to-wit:

"BOND AND MORTGAGE CORPORATION
Security Building
Phoenix, Arizona

April 9, 1930.

Addie Driscoll,
Box 103,
Douglas, Arizona.

Dear Madam:

Answering your letter of April 8th, we wish to advise that the Common stock of the United Clarence Saunders Stores, Inc., is being offered to the public through this company for $10.00 per share.

Trusting that this is the information you desire, we are,

Yours very truly,

BOND AND MORTGAGE CORPORATION,
By: (Signed) M. Loveland,
Assistant Secretary."

for the reason that there was no adequate proof that appellants mailed or caused to be mailed said letter, and for the further reason that there was no showing that appellants had devised or intended to devise a scheme or artifice to defraud or to obtain money by false pretenses, representations and promises, as alleged in the first count of the indictment. (Assignment of error XIV.)

15. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 53, a document which in full substance is as follows:

A mimeographed copy of letters to stockholders of United Clarence Saunders Stores, Inc.,

> dated September 29, 1930, mimeographed signature of A. E. Sanders, President, calling attention to stockholders meeting to be held November 1, 1930, for the purpose of changing the name to United Sanders Stores, Inc. Also states that under the present franchise agreement with Clarence Saunders they have to pay him ½ of 1% of the gross volume of business, which amounts to about $10,000.00 a year, and that under the new plan they will be able to increase their volume of business and save the stockholders this immense royalty by doing away with the Clarence Saunders franchise agreement. Attached to letter is a notice of special meeting to stockholders and blank proxy.

for the reason that such document was hearsay and not binding upon appellants. (Assignment of error XVII.)

16. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 54, a document headed "United Clarence Saunders Stores, Inc., 305 South Second Avenue, Phoenix, Arizona," and being a notice to stockholders, dated October 6, 1930, which is in full substance as follows:

> It states that the primary purpose of the meeting is to change the name of the company to United Sanders Stores, Inc., of Arizona, and to change the plans of the company in respect to operation and management of additional stores proposed to be established. It calls attention to the royalty payments to the Clarence Saunders Corporation mentioned in Exhibit 53. It states

> that the stores would be operated under the name of Sanders U-Save System and would control forty-two stores and five warehouses of four separate corporations, namely, United Clarence Saunders Stores, Inc., Piggly Wiggly Southwestern Company, Piggly Wiggly Yuma Company and U-Save Holding Corporation, all doing a business of over $3,000,000.0 annually and having assets of approximately $2,800,000.00. It gives the qualifications of Mr. H. D. Sanders, who will assume control of the Arizona unit, and his associates, K. C. Van Atta, A. M. Kaler, Warfield Ryley, Cy Measday, J. S. Mackin and A. E. Sanders. It states that a Re-Sales Department to handle the resale of the corporate securities will be established which will create an active market for the securities.

for the reason that said exhibit did not tend to connect appellants with the charge contained in the first count of the indictment and was not biding upon them, and was hearsay. (Assignment of error XVIII.)

17. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 56, being a mimeographed letter to stockholders of United Sanders Stores, Inc., dated January 15, 1931, signed by H. D. Sanders, President, and G. C. Partee, Secretary, which is in full substance as follows:

> It states that the company has expanded, has in operation twenty-six retail stores in Arizona, owns practically all of the stock of Piggly Wiggly Southwestern Company; that the year 1930 had

> been a hard year; that most of the difficulties have been overcome; that the U-Save Holding Corporation has purchased the control of the common stock and is co-operating in the operation of the business which will be very beneficial to the stockholders. It predicts the reduction in expense, the opening of new stores and states that the company is in good financial position.

for the reason that appellants had no connection with said exhibit or the matters and things therein stated, and it was hearsay as to them. (Assignment of error XIX.)

18. The Court erred in admitting in evidence in behalf of the plaintiff, United States of America, over the objection and exception of appellants, Government's Exhibit 64, which is a form letter from United Sanders Stores, Inc., dated January 10, 1931, addressed to the stockholders of the company, signed by G. C. Partee, Secretary, which exhibit is in full substance as follows:

> It states the rapid progress made by the company; that on account of business depression it took a market loss on merchandise. It comments on the financial difficulties of Clarence Saunders Stores, Inc., at Memphis, Tennessee; that the failure affected all units operating under the concessions; that the company was required to change its set-up and its policy of expansion; that in October, 1930, the U-Save Holding Corporation purchased control of the common stock and since that time has been in active management of its affairs with the reduction in expenses of $50,000.00 per annum; that the U-Save Holding Corporation purchased the warehouse

stocks of the company at actual inventory and agreed to serve the company at cost, plus five per cent; that the warehouse inventoried at approximately $110,000.00 and that U-Save Holding Corporation issued in payment $60,100.00 in preferred stock and paid off $40,000.00 of current liabilities; that the deal was very advantageous to the stockholders of United Sanders Stores and concludes with a statement of assets and liabilities as follows:

Current Assets	$423,652.91
Fixed Assets	170,316.93
Net Outside Investments	87,685.10
Deferred Assets	74,076.47
Organization and Development	259,963.24
Concessions	151,000.00
Total Accounts Payable	63,491.17
Payroll	2,069.66
Notes	10,689.74
Debenture Bonds outstanding—	
Less in Treasury	83,900.00
Net Worth	939,944.06

for the reason that said exhibit was incompetent and not binding upon, or applicable to, appellants, and was pure hearsay as to them. (Assignment of error XX.)

19. The Court erred in giving the following instruction to the jury during the course of the charge to the jury, to-wit:

> "You are instructed that on the question of the alleged scheme to obtain money or property by means of fraudulent and false pretenses, the Government need not prove all of the fraudulent

> acts or false representations alleged in the indictment but must prove enough to satisfy your judgment against the presumption of innocence and beyond a reasonable doubt that one or more of the substantial practices, alluded to and specified in the indictment as fraudulent, as to any or all of the defendants, was wilfully and knowingly employed, the question for you to determine is whether enough has been proven within the lines of the charge and not whether all has been proven."

which said instruction was duly excepted to upon the ground that the expression "substantial practices" was indefinite and undefined and tended to confuse the jury, and that the expression "within the lines of the charge" was indefinite, uncertain and tended to confuse the jury. (Assignment of error XXVII.)

20. The Court erred in giving the following instruction to the jury during the course of the charge to the jury, to-wit:

> "It is common knowledge that nothing is more alluring than the expectation of receiving large return on small investments. Eagerness to take chances for large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than one has parted with appeals to the cupidity of all."

to which said instruction appellants duly excepted upon the ground that the same was prejudicial, unnecessary and not justified by the record. (Assignment of error XXVIII.)

BRIEF OF ARGUMENT

I.

THE INDICTMENT UNDER REVIEW IS FATALLY DEFECTIVE BECAUSE (A) IT IS VAGUE, INDEFINITE, UNCERTAIN AND INCOMPLETE, AND (B) IT IS BAD FOR DUPLICITY, IN THAT IT CHARGES MORE THAN ONE SCHEME OR ARTICLE TO DEFRAUD AND CONSEQUENTLY MORE THAN ONE OFFENSE. (Specification of Error 1.)

A.

It is essential to the validity of any count of an indictment that it charge the offense definitely and completely. The indictment under review is vague, indefinite, uncertain and incomplete.

1. The indictment upon its face is in this respect defective for the following reasons:

> It charges the offense as committed prior to the various *dates* on which letters were mailed as alleged in the several counts of the indictment, demurrer to all of which, with the exception of the first count, was sustained, thus removing the points of reference and, if the subsequent counts be referred to, the time of the offense is left wholly indefinite and even carried beyond the date of the offense as charged in the first count (2).
>
> In charging the offense in parts and parcels it charges that the scheme was to obtain money by false pretenses from individuals in the sale of the stock and, also, that the *said scheme* contemplated and resulted in a wrongful control and

conversion of corporate property, the representations alleged as to one phase of the scheme having no bearing upon the other (3, 6, 7).

It charges all of the defendants with having devised an illegal scheme in all of its parts, and at the same time charges one of the defendants, together with persons unnamed, with another series of events inconsistent with the theory of the indictment (6).

The offense, as charged, consists of the mailing of the letter of April 9, 1930, but the indictment charges acts occurring thereafter as part of the same scheme (6).

2. An indictment which is vague, indefinite, uncertain and incomplete is insufficient upon which to charge defendants with the commission of an offense.

United States v. Britton, 108 U. S. 199, 204, 206; 27 L. Ed. 698;

Dalton v. United States (C. C. A. 7), 127 Fed. 544, 545;

Fontana v. United States (C. C. A. 8), 262 Fed. 283, 286, 287;

United States v. McConnell (D. C. Pa.), 285 Fed. 164, 166;

Lynch v. United States (C. C. A. 8), 10 Fed. (2d) 947, 948, 949;

Terry v. United States (C. C. A. 9), 7 Fed. (2d) 28, 30;

31 *Corpus Juris* 659.

B.

If, in a single count, an indictment charges more than one offense, it is guilty of duplicity and vulnerable to attack by demurrer. The first and only count of the indictment under review charges the defendants with the commission of more than one offense. 1. The indictment charges more than a single offense, in that:

> It alleges that defendants devised a scheme to obtain money and property by false pretenses from individuals in connection with the sale of stock and debentures of the corporation and, also, charges that one of the defendants, H. D. Sanders, and his associates who are unnamed, through U-Save Holding Corporation acquired control of the corporation under consideration, took charge of its assets and wrongfully removed its merchandise from the State of Arizona, thus alleging separate schemes operative against different classes and devised and executed by different parties (6).

> The subsequent counts of the indictment, 10 to 13 inclusive, charge separate uses of the mails in furtherance of the H. D. Sanders' transactions, thus evidencing the intent to make these events the basis of separate charges.

> Count 10 of the indictment, Transcript of Record 42;

> Count 11 of the indictment, Transcript of Record 44;

> Count 12 of the indictment, Transcript of Record 50, 56;

Count 13 of the indictment, Transcript of Record 56, 65.

2. A single count of an indictment charging more than one offense is guilty of duplicity and hence fatally defective.

Revised Statutes of the United States, Section 1024; U. S. C. A. Title 18, Section 557;

McElroy v. United States, 164 U. S. 76, 77, 80; 41 L. Ed. 355;

De Luca v. United States (C. C. A. 2), 299 Fed. 741, 743, 745;

McLendon v. United States (C. C. A. 6), 2 Fed. (2d), 660, 661;

Beaux Arts Dresses v. United States (C. C. A. 2), 9 Fed. (2d), 531, 533;

Creel v. United States (C. C. A. 8), 21 Fed. (2d), 690, 691;

Lemon v. United States (C. C. A. 8), 164 Fed. 953, 958;

United States v. Smith (D. C. W. D. Ky.), 152 Fed. 542, 545;

Coco v. United States (C. C. A. 8), 289 Fed. 33, 34, 35;

Pointer v. United States, 151 U. S. 396, 401, 402; 38 L. Ed. 208;

United States v. Morse (C. C. S. D. N. Y.), 161 Fed. 429, 437;

United States v. Morris (C. C. D. Ore.), 18 Fed. 900, 903;

United States v. Hopkins (D. C. S. D. Fla.), 290 Fed. 619, 620, 621.

3. Language of an indictment descriptive of the offense and constituting a charging part thereof cannot be regarded as surplusage.

Exparte Bain, 121 U. S. 1, 13; 30 Ed. 849; *Stewart v. United States* (C. C. A. 9), 12 Fed. (2d), 524, 525;

United States v. Wills (C. C. A. 3), 36 Fed. (2d), 855, 858.

II.

THE FINANCIAL STATEMENTS PREPARED BY L. D. NULL, GOVERNMENT'S EXHIBITS 89, 90 AND 91, WERE ERRONEOUSLY ADMITTED IN EVIDENCE. (Specifications of Error 4, 5 and 6.)

A.

POINTS OF FACT APPLICABLE TO THESE EXHIBITS

1. Appellants had no control over, connection with, or knowledge of, the books and records of the company upon which these exhibits were based (332, 334, 348).

2. All of the supporting records were not identified and the basic sources were not even present in court (252, 363, 365).

3. Such of the books as were in court were themselves but summaries and would not establish the ultimate correctness of these exhibits (360, 364, 369, 370, 373).

4. Those of the books as were present during the

trial were not properly identified and not identified at all for an important period of the corporation's existence (251).

5. The books of the company were shown to be incorrect and to have been kept under the supervision of the same man who falsified them, who was the most important witness upon the subject of identification (255, 417-419).

6. None of the books and records from which these exhibits were compiled were offered or introduced in evidence.

7. No reasonable opportunity was given to appellants adequately to examine and verify the exhibits or to prepare for the cross-examination of the accountants (360, 361, 430).

8. As to Exhibit 91, it purported to show a general or average condition for the nine months' period ending September 30, 1930, in attempted proof of conditions existing on and prior to April 9, 1930, the date alleged as the commission of the offense (378).

B.

POINTS OF LAW APPLICABLE TO EXHIBITS 89, 90 and 91

1. Before expert statements are admissable, sufficient evidence must first be given demonstrating the admissibility of the books and records which the statement purports to summarize.

> *Phillips v. United States* (C. C. A. 8), 201 Fed. 259, 269.

2. Books of account of a third party are inadmissible and constitute hearsay unless the evidence discloses that the party against whom they are offered has some responsibility for, connection with, and knowledge of, them. And even in such case the foundation must be laid showing that the books in question are kept in the regular course of the business; that the entries are either original or the first permanent entries of the transactions they purport to reflect; that they were made at the time or within reasonable proximity to the time of the respective transactions and that the person making them had personal knowledge or obtained such knowledge of the events recorded from a report regularly made to him by some other person employed in the business whose duty it is to make the entries in the regular course of his employment.

Osborne v. United States (C. C. A. 9), 17 Fed. (2d), 246, 247, 248, 249;

Phillips v. United States (C. C. A. 8), 201 Fed. 259, 269;

Chan Kiu Sing v. Gordon, 171 Cal. 28; 151 Pac. 657;

Chaffee & Co. v. United States, 18 Wall. 516; 21 L. Ed. 908, 912;

Hagen Coal Mines, Inc. v. New State Coal Co., et al., (C. C. A. 8), 30 Fed. (2d), 92, 93;

Beck v. United States (C. C. A. 8), 33 Fed. (2d), 107, 113;

Kaplan v. United States, (C. C. A. 2), 229 Fed. 389, 390;

Pabst Brewing Co., v. V. E. Clemens Horst Co. (C.C.A. 9), 229 Fed. 913,918;

Worden v. United States (C. C. A. 6), 204 Fed. 1, 6, 8;

Norcott v. United States (C. C. A. 7), 65 Fed. (2d), 913, 916;

Singer v. United States (C. C. A. 3), 58 Fed. (2d), 74, 76;

McDonald v. United States (C. C. A. 6), 241 Fed. 793, 800;

People v. Mitchell (Cal. 1892), 29 Pac. 1106, 1107;

Wade v. State (Tex. 1896), 35 S. W. 663;
State v. McFalin (Nev. 1918), 172 Pac. 371, 372;

Tipps v. Landers (Cal. 1920), 190 Pac. 173, 174, 175.

3. The cases sometimes cited in alleged departure from the rules announced by the foregoing decisions contain important distinguishing factors and are not truly divergent in principle. For example see:

Barrett v. United States (C. C. A. 8), 33 Fed. (2d), 115;

Stephens v. United States (C. C. A. 9), 41 Fed. (2d), 440, 444, 445;

Butler v. United States (C. C. A. 10), 53 Fed. (2d), 800, 805;

Krotkiewicz v. United States (C. C. A. 6), 19 Fed. (2d), 421, 425, 426.

4. Exhibit 91, which purports to show general or average financial condition on September 30, 1930,

six months after the date of the alleged offense, is inadmissible because of absolute irrelevancy.

Mandelbaum v. Goodyear Tire & Rubber Co., (C. C. A. 8), 6 Fed. (2d), 818, 824;

Gold v. United States (C. C. A. 8), 36 Fed. (2d), 16, 33;

State v. Mobley (Okl. 1925), 241 Pac. 155, 157;

Brenan v. Eubank (Tex. 1933), 56 S. W. (2d), 513, 515;

California Credit etc. Corp. v. Bernardini (Cal. 1926), 246 Pac. 824, 825;

Ellis v. State (Wis. 1909), 119 N. W. 1110, 1114;

Rardon v. Davis (Mo. 1932), 52 S. W. (2d), 193, 195;

Davidter v. Ash (Neb. 1933), 249 N. W. 886.

III.

GOVERNMENT'S EXHIBITS 109 AND 110, BEING INCOMPLETE MEMORANDUM CARDS KEPT IN THE OFFICE OF THE COLLECTOR OF INTERNAL REVENUE FOR ARIZONA, PURPORTING TO CONTAIN CERTAIN FIGURES OR SUMS COPIED FROM THE ORIGINAL RETURNS OF THE CORPORATION, WERE ERRONEOUSLY ADMITTED IN EVIDENCE. (Specifications of Error 7, 8.)

A.

POINTS OF FACT APPLICABLE TO THESE EXHIBITS

1. The memorandum cards themselves are on their

faces incomplete, showing only copies of certain totals without any of the supporting data from the original returns (442, 446).

2. The Collector of Internal Revenue, Mr. Davidson, admitted that he knew nothing about the entries on the exhibits, whether they were true or correct, whether they had been correctly copied from the original returns or who signed such returns (439).
3. The record is silent as to any effort to produce either the original returns or certified or authenticated copies which were available under statute and regulations.

B.

POINTS OF LAW APPLICABLE TO THESE EXHIBITS

1. Even were these exhibits not hearsay as to appellants and were binding upon them, the only method recognized by law of using income tax information, where such use is permissible, is by the introduction of the original or a copy properly certified or authenticated, any other attempted proof in such connection being violative of the best evidence rule.

> *Corliss v. United States* (C. C. A. 8), 7 Fed. (2d), 455, 457.

2. Copies of the original returns properly certified or authenticated were obtainable and any attempted proof by other means is inadmissible.

> *Revised Statutes of the United States*, Section 882; U. S. C. A. Title 28, Section 661;
>
> *Regulation 74 of the Treasury Department*, Section 55, Art. 422; ...

Gibson v. United States (C. C. A. 9), 31 Fed. (2d), 19, 22;

In re Epstein (D. C. Mich. 1924), 300 Fed. 407, 408, affirmed In re Epstein (C. C. A. 6), 4 Fed. (2d), 529, 530;

Lewis v. United States (C. C. A. 9), 38 Fed. (2d), 406, 413;

Mohawk Condensed Milk Co. v. United States (C. C. 1930) 48 Fed. (2d), 682, 685.

IV.

APPELANTS' CROSS-EXAMINATION OF TOM H. BRANDT WAS UNDULTY RESTRICTED AND THEY WERE ERRONEOUSLY PREVENTED FROM DEMONSTRATING, BY THE INTRODUCTION OF EVIDENCE, THE INCREDIBILITY OF THE TESTIMONY OF THIS WITNESS, WHOSE IDENTIFICATION OF BOOKS AND RECORDS, AND WHOSE TESTIMONY OTHERWISE, WAS ESSENTIAL TO THE GOVERNMENT'S CASE (Specification of Error 9, 10).

A.

POINTS OF FACT APPLICABLE TO BRANDT'S CROSS-EXAMINATION.

1. Brandt was the most indispensable government witness (251, 261, 267, 324, 391, 411).

2. He identified the books of account of the corporation, present in court, for the important period commencing September 15, 1929, and ending August 7, 1930, and stated that they were true and correct (252, 253).

3. His testimony on the trial was inconsistent with

certain government exhibits previously prepared or approved by him in the course of his employment by the comapny.

> Compare testimony, Transcript of Record 330-339 with Government's Exhibit 40, Transcript of Record 333, 335.
>
> Compare testimony, Transcript of Record 330, with Government's Exhibit 22, Transcript of Record 248, 249, 250.

4. Brandt admitted making one important, fictitious entry (418).

5. He denied that any portion of a $5,000 withdrawal of company funds was appropriated for his own personal use (416, 417, 418).

6. Appellants offered to prove by their avowal that if permitted to cross-examnne Brandt he would testify that he was personally resopnsible for the shortage of $5,000, that he had embezzled the same and that $2,500 or $3,000 thereof had been actually appropriated to his own use and that many of the books of the company were kept in his own home for the purpose of concealing transactions (425).

7. Appellants offered in evidence the signed confession of this witness and checks showing misappropriation of funds to his own use (419, 422, 423).

B.
THE LAW APPLICABLE TO BRANDT'S CROSS-EXAMINATION

1. Reasonable latitude in the cross-examination of a witness is a matter of absolute right, one of its purposes being to bring out facts tending to discredit

him by showing that his testimony in chief was untrue or biased and that he is not entitled to belief, and a denial of this right is prejudicial error.

Alford v. United States, 282 U. S. 687, 691; 75 L. Ed., 624;

Cossack v. United States (C. C. A. 9), 63 Fed. (2d), 511, 516, 517;

Heard v. United States (C. C. A. 8), 255 Fed. 829, 832.

V.

THE GOVERNMENT FAILED TO PROVE BY ANY COMPETENT EVIDENCE WHATSOEVER CERTAIN MATERIAL ALLEGATIONS OF THE INDICTMENT, AND FOR THIS ADDITIONAL REASON ERRED IN OVERRULING APPELANTS' MOTIONS FOR DIRECTED VERDICT

(Specifications of Error, 2, 3, 14).

1. There was no identfication of the signature of M. Loveland to government's Exhibit 43, the mailing of which is pleaded in the indictment as the offense charged (13).

2. The government's evidence disclosed that in the important events touching the organization and capitalization of the company appellants did not participate (345, 346).

3. The government's evidence discloses that appellants did not participate in the acquisition of the Saunders franchise or in the issuance of stock to A. E. Sanders in consideration of the transfer thereof (349).

4. A. E. Sanders, the Government's witness, contradicted himself as to appellants' participation at the inception of the enterprise (345, 352).

5. The proof as to the issuance of 35,000 shares charged in the indictment was directly contradicted by the government's evidence (356).

6. The evidence shows a disassociation, rather than an association, between appellants and A. E. Sanders and between appellants and H. D. Sanders (349, 350, 351, 352, 355, 357, 358).

7. No evidence was introduced as to the payment of a dividend on June 29, 1929, the proof of a June payment a year later not being charged.

8. The evidence of the government disclosed that appellants had not connection with the H. D. Sanders' events or the U-Save Holding Corporation transactions and no contact with the letters written in connection therewith, all of which, however, were introduced against appellants who were the only defendants standing trial.

Exhibit 52, Transcript of of Record, 279.
Exhibit 53, Transcript of Record, 280.
Exhibit 54, Transcript of Record, 281.
Exhibit 56, Transcript of Record, 289.
Exhibit 64, Transcript of Record, 297.
See also Transcript of Record 212, 213, 214, 219.

9. There was no evidence as to the removal of $100,000.00 of merchandise as against any defendant.

10. The proof showed that the letter charged as constituting the offense was not mailed for the pur-

pose of executing the scheme to defraud because the recipient thereof, Mrs. Addie Driscoll, had already purchased certain shares of stock and bought no more thereafter (293).

VI.

THE GOVERNMENT ATTEMPTED, BY THE INTRODUCTION OF EVIDENCE, TO PROVE TWO DISTINCT SCHEMES TO DEFRAUD, IN ONE OF WHICH, IT WAS AFFIRMATIVELY SHOWN, APPELLANTS HAD NO CONNECTION WHATSOEVER. PROOF OF TWO OR MORE SCHEMES ALLEGED AS ILLEGAL ENTERPRISES IS NOT PERMISSIBLE UNDER ONE COUNT OF AN INDICTMENT (Specifications of Error 3, 11, 12, 13, 15, 16, 17, 18).

1. Proof of letters mailed, reports to stockholders, incorporation proceedings and annual report to the state, all appertaining to H. D. Sanders and his U-Save Holding Corporation activities, were introduced.

2. Evidence tending to establish two or more schemes alleged as illegal enterprises, which do not converge to a common end, is not permissible under one count of an indictment.

Terry v. United States (C. C. A. 9), 7 Fed. (2d), 28, 30;

McElroy v. United States, 164 U. S. 76, 77, 80; 41 L. Ed. 355;

De Luca v. United States (C. C. A. 2), 299 Fed. 741, 745;

Tinsley v. United States (C. C. A. 8), 43 Fed. (2d), 890, 893;

Coco v. United States (C. C. A. 8), 289 Fed. Fed 33, 35;

Wyatt v. United States (C. C. A. 3), 23 Fed. (2d), 791, 792;

Marcante v. United States (C. C. A. 10), 49 Fed. (2d), 156, 157;

United States v. Siebrecht (C. C. A. 2), 59 Fed. (2d), 976, 977, 978;

Beaux Arts Dresses v. United States (C. C. A. 2), 9 Fed. (2d), 531, 533;

Nazzaro v. United States (C. C. A. 10), 56 Fed. (2d), 1026, 1028.

VII.

INSTEAD OF PROVING THE OFFENSE AS LAID IN THE INDICTMENT, BEYOND A REASONABLE DOUBT, THE EVIDENCE AFFIRMATIVELY DISCLOSED THAT THERE WAS NO COMBINATION IN UNLAWFUL INTENT OR ACTIVITY ON THE PART OF THE DEFENDANTS (Specification of Error 3).

1. A. E. Sanders, as a Government witness, testified that there was no unlawful intent (354).

2. As a result of appellants' efforts, between $800,000.00 and $900,000.00 actually went into the treasury of the corporation as fresh capital (349).

3. The payment of the commissions was expressly allowed by the corporation commission and the sale of the shares to A. E. Sanders, issued by express permission of the Corporation Commission, was not restricted (222).

4. These shares were not transferred to appellants by Sanders immediately but only intermittently upon fulfillment of a schedule of performance in the sale of company shares (405).

5. The allegation of the indictment with respect to the 35,000 share block failed of proof (356).

6. The company did make substantial progress (223, 229, 230, 232, 233, 235, 236, 287).

7. The causes which contributed to the failure of the enterprise were not attributable to appellants.

(a) A. E. Sanders was absent upon another project during the critical period of the corporation's existence (330, 352).

(b) Unwise purchases were made resulting in heavy inventory loss (353).

(c) The company was heedlessly committed to the assumption of obligations, having no relation to its business and contrary to its welfare (247).

(d) When H. D. Sanders intervened the control of the company passed into his hands and its books and assets removed from the State (260).

(e) Brandt, the chief witness for the Government, had himself secretly abstracted $5000.00 of company funds (417).

VIII.

THE COURT ERRED IN GIVING TO THE JURY THE FOLLOWING INSTRUCTION (Specification of Error 19):

> "You are instructed that on the question of the alleged scheme to obtain money or property

by means of fraudulent and false pretenses, the Government need not prove all of the fraudulent acts or false representations alleged in the indictment but must prove enough to satisfy your judgment against the presumption of innocence and beyond a reasonable doubt that one or more of the substantial practices, alluded to and specified in the indictment as fraudulent, as to any or all of the defendants, was wilfully and knowingly employed, the question for you to determine is whether enough has been proven within the lines of the charge and not whether all has been proven."

A.

The instruction submitted to the jury, in determining the guilt or innocence of appellants, allegations of the indictment and evidence of events with which appellants had no connection.

Transcript of Record 350;
Transcript of Record 279, 280, 281, 289, 211, 212, 213, 214.

B.

The instruction is vague, ambiguous and misleading and erroneously referred the jury to the indictment in determining the issues.

Baltimore & Ohio R. Co. v. Lockwood, 72 Ohio State, 586, 590; 74 N. E. 1071, 1072;

Director General v. Pence's Administratrix (Va. 1923), 116 S. E. 351, 357;

Laughlin v. Hopkinson, 292 Ill. 82, 84;

Lerette v. Director General, 306 Ill. 348, 354;

Krieger v. A. E. & C. R. R. Co. 242 Ill. 544, 548;

Mulroney Mfg. Co. v. Weeks (Ia. 1919), 171 N. W. 36, 37;

Arkansas Fuel Oil Co. v. Connellee (Tex. 1931), 39 S. W. (2d) 99, 101;

Gorman v. St. Louis Merchants' Bridge Terminal Ry. Co. (Mo. 1930), 28 S. W. (2d) 1023, 1025;

Mack v. State (Fla. 1917), 74 So. 522, 534;

Lombard-Hart Loan Co. v. Smiley, (Okla. 1925), 242 Pac. 212, 213;

Hines v. Gale, (Ariz. 1923), 213 Pac. 395, 399.

IX.

THE COURT ERRED IN GIVING TO THE JURY THE FOLLOWING INSTRUCTION (Specification of Error 20):

> "It is common knowledge that nothing is more alluring than the expectation of receiving large return on small investments. Eagerness to take chances for large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than one has parted with appeals to the cupidity of all."

In instructing the jury as to what is common knowledge and in the use of inapt and prejudicial illustrations, the instruction constitutes prejudicial error.

Woodward Iron Co. v. Sheehan (Ala. 1910), 52 So. 24, 26;

Neel, et al. v. Powell (Ga. 1908), 61 S. E. 729, 731.

ARGUMENT

Foreword

The consideration of this appeal involves both an analysis of the indictment and a close study of the facts particularly with reference to the attempt on the part of the government to establish the alleged falsity of the representations. So obviously erroneous was the admission in evidence of the financial statements or summaries (Exhibits 89, 90 and 91) and the income tax memorandum cards (Exhibits 109 and 110), that the discussion of these subjects in the ensuing argument will immediately follow the presentation of the points upon the indictment, since, it is believed, the consideration of the facts and law touching these exhibits will render unnecessary any elaborate study of the other points, well founded, it is submitted, as they also are, both from a legal and factual standpoint.

I.

THE INDICTMENT UNDER REVIEW IS FATALLY DEFECTIVE BECAUSE (a) IT IS VAGUE, INDEFINITE, UNCERTAIN AND INCOMPLETE, AND (b) IT IS BAD FOR DUPLICITY, IN THAT IT CHARGES MORE THAN ONE SCSHEME OR ARTIFICE TO DEFRAUD AND, CONSEQUENTLY MORE THAN ONE OFFENSE (Specification of Error 1).

VAGUENESS AND UNCERTAINTY

It is axiomatic that an indictment, more than the pleading of any other criminal or civil claim, must clearly, exactly, completely and unambiguously set forth the offense charged. The section under which appellants were prosecuted is referred to in the in-

dictment and generally known as the provision respecting the "Use of the United States Mails in Furtherance of a Scheme to Defraud." Referring to a prosecution under Section 215 of the Criminal Code, one court aptly said that the use of the mails was the *gist* of the offense and the scheme to defraud the *genesis*. At the threshold of the inquiry the question immediately arises, what is the scheme or artifice charged as constituting a criminal enterprise?

The indictment itself, in its opening paragraph, designates the offense intended to be pleaded by charging that the defendants "did devise and intended to devise a scheme and artifice to defraud *and* to obtain money and property by means of false and fraudulent pretenses," against certain named individuals, and from a number of other persons, including the public generally, whose names are unknown. Leaving out of consideration, for the moment, the question as to whether or not the pleading of a scheme to defraud *and* to obtain money by false pretenses contemplates two schemes or artifices, it is certain that the indictment does allege a scheme to defraud by means of false pretenses, for the purpose of obtaining money from individuals both named and unknown. This constitutes the promise of the government of what it will plead in the ensuing paragraphs of the indictment and of what it will prove on the trial and is the test to which the subsequent allegations must be submitted.

The vague, uncertain and defective character of the indictment is quickly apparent when an attempt is made to fit the allegations of the first count into the plan or pattern of a case in which the offense is described as a scheme to obtain money or property by false pretenses. It is obvious that the first count

was drawn in contemplation of the continued existence of the ensuing sixteen counts and, in addition to describing the offense in parts and parcels, it is evident that the pleader intended the first count to be a part and parcel of a charge embracing seventeen separate counts in their totality. The successful demurrer to the last sixteen counts leaves the first standing alone without the expected support of its fellows, and, alone, it presents a peculiar legal spectacle.

As a part of the first count, indeed in the first words thereof, the Grand Jurors charge that the scheme was devised "prior to the *dates* on which the letters were mailed as hereinafter alleged in the *several counts of this indictment.*" (2) The use of the plural word "dates" and the reference to the several counts of the indictment permits the proof of the offense to roam freely over the calendar.

As has been said, the elimination of the last sixteen counts removed them from consideration as points of reference and it would be no answer to contend that such letters are admissable for the purpose of demonstrating intent because, in this connection, we are considering the government's description of the offense, which, under the first count of the indictment, was completed by the mailing of the letter to Addie Driscoll on April 9, 1930 (Government's Exhibit 43, Transcript 13).

This condition of the pleading, in the very opening paragraph, finds the government pinioned on either of two horns of a dilemma. If it be not permitted to use the letters and documents, with their several dates, charged as separate offenses in the ensuing counts, for the purpose of reference in fixing the time

of the devising of the scheme charged in the first count, then this element of the offense is left a virtual blank, making the pleader say, in effect, "prior to the dates hereinafter alleged a scheme was devised," and then failing to allege any date whatsoever. If, on the other hand, the government be permitted to use the dates of the letters and documents in the last sixteen counts of the indictment, for the purpose of reference in fixing the *times* when the scheme was devised and intended to be devised, then a situation wholly insupportable is presented.

The offense charged in the first count of the indictment is the devising of a scheme to defraud and the mailing of a letter in furtherance thereof on April 9, 1930. On that date, therefore, the act, which the government contends rendered the defendants guilty, was done and on that date the offense must be regarded as completed. The two elements of the charge, the devising of the scheme and the mailing of the letter, the *genesis* and the *gist* of the offense, combined to render the defendants amenable to trial for the alleged violation of Section 215 of the Criminal Code. But, the indictment charges, the dates on which the scheme was devised, and for which the defendants are prosecuted, extended from November 23, 1928 (the date of the incorporation of Clarence Saunders Stores, Inc. (3),) and on various dates thereafter, to February 19, 1931 (a letter mentioned in the tenth count of the indictment appearing in the Transcript at page 42). Defendants are confronted, therefore, with the claim that they devised a single scheme on various dates *as late as February 19, 1931* (42), and that in furtherance *of that scheme* they mailed a letter on April 9, 1930, ten months before the final fruition of the scheme charged as devised and intended to be devised during a period covering some twenty-seven

months. Even under the most relaxed rules of civil pleading a defendant could not be brought to trial confronted with a claim so alleged.

After announcing that the enterprise complained of was a scheme to obtain money by false pretenses, the indictment, after several intervening paragraphs, charges that it was further a part of said scheme, "and in furtherance thereof," for the purpose of inducing the persons to be defrauded to part with their money and property in the purchase of stock and debentures of the corporation, that the defendants would and did make false representations to the persons to be defrauded by means of conversations, letters, financial statements, etc. Then follows the series of fourteen numbered pragraphs describing the representations (8). In the intervening paragraphs, however, appear allegations to the effect that the defendant, H. D. Sanders, and his associates, organized a corporation which finally came to be known as U-Save Holding Corporation, which acquired the majority of the common stock of United Sanders Stores, Inc., and, after proceeding to take charge of its assets, removed merchandise valued at more than $100,000 from the warehouses of the company in Arizona to California without making proper accounting (6). This alleged event will be more particularly considered in connection with appellants' contention that the indictment at bar is bad for duplicity, but, in addition thereto, it is apparent that the various representations alleged as being false have, and could have, no bearing upon the acquisition of the capital stock of the company or the wrongful removal of its merchandise by H. D. Sanders and his associates. While such a transaction might have been wrongful or even criminal, by its very nature it could play no part in the alleged false representations made to the various in-

dividuals for the purpose of inducing them to part with their money and property. This element of the offense, if offense it be, was committed against the corporation. The charge, it must be remembered, is that the representations were made for the purpose of inducing *various persons to part with their money in the purchase of stock and debentures* (7).

The indictment is uncertain and insufficient, moreover, in that it charges all of the defandants, including appellants and A. E. Sanders and H. D. Sanders, with having devised an illegal scheme in all of its parts, and at the same time charges one of the defendants, H. D. Sanders, together with his individual associates whose names are unknown, with another series of events utterly incongruous with the theme of the indictment. Here, again, the court's attention is respectfully directed to the organization of the U-Save Holding Corporation on February 24, 1930, the acquisition by it of the capital stock of the corporation under consideration and the wrongful removal of the property from Arizona to California (6).

In attempting to charge the crime in a series of disjointed parts, some pertinent and some wholly inapplicable, some charged as both a part of the scheme and as acts in furtherance thereof, the government presents a jig-saw puzzle to the defendants and requests them and the court to try to fit the pieces in their proper places. The trouble with the indictment at bar, however, is that the pieces do not fit.

In *United States v. Britton*, 108 U. S. 199; 27 L. Ed. 698, the court, in passing upon the sufficiency of an indictment charging conspiracy against officers and directors of a national bank to misapply funds, said at page 204:

> "The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under Section 5440, the conspiracy must be s u f f i c i e n t l y charged; and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

Speaking further, the court said, at page 206:

> "The indictment having charged a conspiracy between the defendants to misapply the moneys of the association, proceeds to aver by what means the misapplication was to be effected, namely: by procuring to be declared by the Association a dividend when there were no net profits to pay it."

The court concluded that the indictment was fatally defective.

While, in the instant case, a technical conspiracy is perhaps not charged, nevertheless, a scheme or artifice to defraud is charged resembling, in many of its aspects, a conspiracy, which the venerable Judge Holmes termed "a partnership in criminal purposes" (218 U. S. 601). It follows, consequently, that the

various averments of what the defendants did in furtherance of the scheme do not aid any insufficiency in the indictment in charging the scheme as designed and intended by the defendants. Section 215 applies, it has been held, even though the defendants *only intentionally designed* the unlawful plan and did nothing further in effecting its object than to make a single use of the United States mails.

In *Dalton v. United States* (C. C. A. 7), 127 Fed. 544, the defendants were indicted for using the mails for the purpose of effecting a fraud. Quoting from *United States v. Hess*, 124 U. S. 483, 486; 31 L. Ed. 506, the court, in reversing the judgment of conviction and holding the indictment bad, said at page 545:

> " 'As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial. The averment here is that the defandant, "having devised a scheme to defraud divers other persons to the jurors unknown," intended to effect the same by inciting such other persons to communicate with him through the postoffice, and received a letter on the subject. Assuming that this averment of "having devised" the scheme may be taken as sufficiently direct and positive, the absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken. . . . Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a

statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." United States v. Hess, 124, U. S. 483, 486, 487, 8 Sup. Ct. 571, 573; 31 L. Ed. 516.

So, also, in *Pettibone v. United States*, 148 U. S. 197, 202, 13 Sup. Ct., 542, 545, 37 L. Ed. 419, it is said:

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially or by way of recital. *United States v. Hess*, 124 U. S. 483, 486 (8 Sup. Ct. 571; 31 L. Ed. 516). And in *United States v. Britton*, 108 U. S. 199 (2 Sup. Ct. 531, 27 L. Ed. 698), it was held in an indictment for conspiracy under Section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

So, also, in *Blitz v. United States*, 153 U. S. 308, 315, 14 Sup. Ct. 924, 927, 38 L. Ed. 725, it is said:

"The general rule that an indictment for an offense purely statutory is sufficient, if it pursues substantially the words of the statute, is subject to the qualification, fundamental in the law of criminal procedure, 'that the accused must

be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offence.' *United States v. Simmons*, 96 U. S. 360, 362 (24 L. Ed. 819); *United States v. Hess*, 124 U. S. 483, 488 (8 Sup. Ct. 571, 31 L. Ed. 516). As said in *United States v. Carll*, 105 U. S. 611, 612 (26 L. Ed. 1135), it is not sufficient to set forth the offense in the words of the statute, 'unless those words of themselves fully, directly and expressly, without any uncertaintly or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished'."

Summing up the rule in a line, the court said at page 547:

> "Every particular of the scheme must be directly and positively averred."

In *Fontana v. United States* (C. C. A. 8), 262 Fed. 283, the defendant was convicted for the violation of the Espionage Act of June 15, 1917. In reversing the case and directing the defendant's discharge, the court first laid down the fundamental principle as to the requirement of certainty, saying, at page 286:

> "The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportu-

nity to prepare his defense, is an indispensable element of that process. When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading."

Then, speaking of the nine allegations of false statements by the defendant, the court said, at page 286:

"If the pleader had set forth in this indictment any fact or facts, such as the time, place, occasion, circumstances, persons present, or any other distinctive earmark whereby the defendant could have found out or identified the occasion or occasions when the government intended to attempt to prove that the defendant uttered any of the nine sayings charged he might have been able to investigate the basis of the charges, to learn who were or were not present on the occasions referred to, hence who were possible witnesses, and to prepare his defense; but there is nothing of that kind in the indictment. As it reads, he might have been called to meet on each of the nine charges testimony that at any time of day or night, at any place in New Salem, on any occasion, public or private, before the indictment was filed, and after the Espionage Act was was passed on June 15, 1917, he had uttered to any one whomsoever any of the statements charged in the indictment. These considerations compel the conclusion that this pleading signally

> failed to state the facts which the government claimed constituted the alleged offense in this case, so distinctly as to give the defendant a fair opportunity to prepare his defense to meet any of them, and that he could not and did not have that notice of them required to give him a fair trial."

Speaking further, the court said, at page 287:

> "Nor were the charges in this indictment so certain and specific that upon conviction or acquittal thereon it or the judgment upon it constitute a complete offense to a second prosecution of the defendant for the same offense. In determining this question the evidence on the trial may not be, and the indictment and the judgment alone can be, considered, because the evidence does not become a part of the judgment, and as the indictment states no facts from which the time, places, or occasions on which the respective statements therein were alleged to have been made can be identified, the indictment and judgment failed to identify the charges so that another prosecution therefor would be barred thereby."

The indictment in the present case charges, as did the indictment in the Fontana case, fourteen instances of alleged misrepresentation without indicating the time at which such representations were made other than the announcement in the opening paragraph that the scheme was devised prior to the various dates alleged in the seventeen counts, which, as has been said, ran from August 29, 1929 (73), to February 19, 1931, including many intervening points of time. The letters pleaded in the succeeding counts are not, it must be noted, alleged as themselves constituting the false representations charged in the

first count. Paraphrasing the language of the *Fontana* case, 'the defendants might have been called upon to meet, on each of the fourteen charges, testimony that at any time of day or night before the indictment was filed the defendants or any of them had made to any one whomsoever, any of the statements charged in the indictment.'

The case at bar goes even further than any case examined because, while the defendants are charged with an offense committed and completed on April 9, 1930, they are also charged with the devising of a scheme in furtherance of which said letter was sent prior to April 25, 1930 (16), prior to January 31, 1931 (19), prior to July 1, 1930 (22), prior to April 3, 1930 (25), prior to March 26, 1930 (33), prior to July 22, 1930 (36), prior to May 9, 1930, (39), prior to February 19, 1931 (42), prior to January 25, 1931 (46), prior to January 10, 1931 (52), prior to October 6, 1930 (58), prior to September 16, 1930 (67), prior to August 12, 1930 (71), prior to August 29, 1929 (73), prior to July 21, 1930 (77). Such latitude was never intended by the farthest reaches of leniency.

In *United States v. McConnell* (D. C. Pa.) 285 Fed 164, the indictment charged a conspiracy to defraud the United States by the unlawful issuance of permits to purchase liquor. While the court sustained the particular indictment under consideration, it said at page 166:

> "While, under Section 1024, R. S. (Comp. St. Sec. 1690), it is allowable to join in one indictment several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or

> more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, there is no authority under the law for joining in one indictment, even in separate counts, such charges against different persons, and, where they are against the same persons, each charge must be set out in a different count. * * * If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment."

Nothing could be more certain than that the injection into the indictment of the H. D. Sanders' events, in which he and his associates participated, is a transaction irrelevant to the underlying theory of the indictment and causes the reader to pause and wonder for just what scheme the defendants were indicted.

In *Lynch v. United States* (C. C. A. 8), 10 Fed. (2d) 947, the defendant was indicted for possessing liquor in Indian country. The indictment charged "that heretofore, on to-wit, on or about the 7th day of December, 1922," the defendant did knowingly have in his possession certain intoxicating liquors. The court, in holding that the indictment was insufficiently specific, said at page 948:

> "This court has many times stated the fact essentials of a valid indictment. In *Miller et al. v. United States*, 133 F. 337, 341, 66 C. C. A.

399, 403, it said: 'It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction'."

Speaking further, the court said, at page 949:

> "Does it set forth the facts, which the pleader claimed constituted the offense in this case, so distinctly as to apprise the defendant of the charge he had to meet, and so completely as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense?"

Answering the question so propounded, the court said, in part, at page 949:

> "Where one is indicted for a serious offense, the legal presumption is that he is not guilty: that he is ignorant of the supposed facts upon which the charge is founded. A demurrer to the indictment must be considered and determined on that presumption, on the presumption that the defendant does not know the facts that the prosecutor thinks make him guilty, and that he is unable to procure and present the evidence in his defense and is deprived of all reasonable opportunity to defend unless the indictment

clearly discloses the earmarks, the circumstances and facts surrounding the case of the alleged offense, so that the defendant can identify, procure witnesses and make defense to it."

In *Terry v. United States* (C. C. A. 9), 7 Fed. (2d) 28, the defendants were convicted of conspiracy to violate the National Prohibition Act. In passing upon the indictment the court said at page 30:

> " 'If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment.' *United States v. McConnell* (D. C. 285 F. 164."

The general rule is summarized in 31 *Corpus Juris* 659, as follows:

> "An indictment, information, or complaint must be positive in respect to the charge that the person accused committed the crime which henders him amenable to the charge, and must directly and positively allege every fact necessary to constitute the crime. Nothing can be charged by implication or intendment, nor is it sufficient to charge any material matter by way of argument, or as based on suspicion; the offense cannot be charged on information and belief, nor can the averments be aided by imagination or presumption."

DUPLICITY AND MULTIFARIOUSNESS

In addition to its vague and uncertain character, the indictment is defective from an even more serious standpoint. It may be taken as fundamental that where the charge, in a single count, embraces allegations demonstrating two or more distinct offenses it is bad for duplicity. As has been said, the keynote of the first count of the indictment under consideration is sounded in the words the "defendants * * * did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, as hereinafter set forth, from W. H. Forman (and others named) and from a large number of other persons, including the public generally whose names because of their great number and want of information on the part of the Grand Jurors are not given herein, all of which persons are hereinafter called 'the persons to be defrauded'." This pronouncement, like the title to a Legislative Act, prescribes the limitations of the ensuing allegations.

This designation of the offense by the pleader may be separated into the following elements:

1. The defendants devised a scheme to defraud and to obtain money and property.
2. The means by which such money and property were to be obtained consisted of false and fraudulent pretenses.
3. The scheme is designed as operative upon certain named individuals and others who are called "the persons to be defrauded."

If these three elements of the offense be placed in what may be termed a "frame of reference" and the

remaining allegations of the indictment examined, only the consistent assertions of fact will smoothly fit into the frame, while every inconsistent averment which does not match the pattern will exclude itself.

Therefore, if, in attempting to charge a scheme to defraud various individuals by making false representations to them to induce them to purchase stock and debentures, the indictment also charges a scheme on the part of one of the defendants and his associates (not his co-defendants) to defraud the corporation and its stockholders, against whom the device originally alleged had already operated, it follows with mathematical inevitability that the indictment charges more than one offense.

In short, the scheme must possess as its inherent and necessary vice, false pretenses and promises. This, as has been said, is the Government's own announced and basic undertaking.

It is acknowledged, of course, that a criminal enterprise, like a lawful enterprise, may change and develop with time and circumstances; that many acts may combine to constitute one crime in a general plan or scheme when they are alleged as connected with the same transaction; that to aver successive stages of fact or successive steps or transactions is not, or may not be, double or multiple pleading; that statements by way of inducement or description may compose but parts of the narrative leading up to the final statement of the offense, and even that different means or methods of accomplishing the criminal end may be pleaded, provided there is no repugnancy, and that there is a common end.

But, a single count charging acts, each of which is or may be a crime but which have no relation one

to the other and no relevancy to the offense pleaded, is inescapably bad. If, too, there be added to these circumstances averments of acts or transactions of different defendants with their own individual associates, such acts and transactions having obviously no part or purpose in the scheme to defraud as originally designated, the quality of duplicity is aggravated.

Not only does the first paragraph of the indictment describe and limit the offense, it will be found that, also, after the intervening paragraphs narrating the organization of the corporation and the various acts of the defendants with reference thereto, the indictment proceeds to charge that "it has further a part of said scheme and artifice and in furtherance thereof, that the defendants, for the purpose of inducing the persons to be defrauded to part with their money and property *in the purchase of the common and preferred stock and debenture bonds* of said Clarence Saunders Stores, Inc., and its successors, would and did unlawfully, fraudulently and knowingly and feloniously make false pretenses, representations and promises to the persons to be defrauded." Here appears a further and more specific delineation of the offense, the representations now being charged as having been made for the purpose of inducing "the persons to be defrauded" to part with their money *in the purchase of the common and preferred stock and debenture bonds* (7).

Then ensue the series of allegations charging misrepresentation, all of which are alleged as being made to the persons to be defrauded, *by inducing them to purchase stock and debentures of the company.* These representations are the essence of the scheme.

In reading the indictment the court will note that each paragraph narrating the progress of events begins "It was a part of said scheme and artifice *that the defendants* should and they did" organize a corporation, change its name, cause the transfer of the Saunders franchise to the corporation and the issuance therefor of 151,000 shares of common stock, etc. Coming to the second and third paragraphs of the indictment appearing on page 6 of the printed transcript, the court will find an abandonment of this preliminary language and the allegation of events which by no possibility could comprise a part of the scheme to obtain money by false pretenses made "to the persons to be defrauded" in the purchase of stock and debentures.

It is alleged that H. D. Sanders and his associates organized, under the laws of Arizona, the Piggly Wiggly Holding Corporation, the name of which was subsequently changed to U-Save Holding Corporation on February 24, 1930, which corporation was thereafter engaged in business in Los Angeles, California. It is further averred that the said U-Save Holding Corporation acquired the majority of the common capital stock of the United Sanders Stores, Inc., proceeded to take charge of its assets and wrongfully removed certain of its merchandise, valued at more than $100,000.00, from the warehouses of the company in Phoenix, Tucson and Nogales, Arizona, shipping it to Los Angeles, California. The "associates" of H. D. Sanders are not named, and it must be presumed that they were not the defendants. As a matter of fact that this is true subsequently developed in the proof (281). What the wrongful acquisition of control of the corporation and the illegal removal of its assets could have to do with obtaining money and property from "the persons to be defrauded" by

means of false pretenses in the sale of stock and debentures, it is impossible to comprehend. These transactions simply will not fit in the frame of reference and, since they are alleged as constituting a series of wrongful acts pursuant to which the mails were used, it necessarily follows that they comprise also a separate scheme and, accordingly, a separate offense.

The actors are different, the acts and transactions are different and the party to be defrauded or against whom the acts and transactions operated, is different. Such allegations are as foreign to the scheme to defraud by means of false representations to buyers of securities as an inserted charge of larceny or embezzlement.

As has been said, when the indictment was submitted to the Grand Jury the pleader contemplated the continued existence of an indictment in seventeen counts. It is only when other counts, upon which appellants were not convicted and under which none of the defendants stood trial, are examined, that the purport of these allegations in the first count becomes plain. Then, also, it appears that these averments are, and were originally intended to be, the basis of separate subsequent counts which incorporated the first by reference. To repeat, the indictment charges a scheme to obtain money and property by means of false pretenses from various individuals. If the allegations under consideration are examined in connection with one of the alleged misrepresentations included in paragraph 10 of the fourteen numbered paragraphs of the first count it will be found that the representation there charged *does not include the effort to induce the persons to be defrauded to part with their*

money and property in the purchase of the stock and debentures of Clarence Saunders Stores, Inc., but, instead, necessarily contemplates a fraud upon persons already stockholders.

The true significance of the "H. D. Sanders" paragraphs is made apparent by an examination of Count Ten of the indictment (42) which charges that on February 19, 1931, at Los Angeles, California, *in said District of Arizona*, a letter was mailed to one W. H. Forman, "one of the persons to be defrauded." This letter is of extreme importance in determining the true purport of these paragraphs. It is dated at Los Angeles, California, *February 19, 1931* and is signed *H. D. Sanders, President.* It appears on the stationery of U-Save Holding Corporation *and requests the surrender of the stock of the original corporation* in exchange for the capital stock of U-Save Holding Corporation, asserted as having a book value of $18.60 a share. After setting out the letter, the Tenth Count of the indictment concludes that *the statements therein made by the defendants* were false and untrue.

Again, in Count Eleven (44) another letter is set forth (46) emanating from U-Save Holding Corporation, dated at Los Angeles, California, on *January 25, 1931*, and addressed to the stockholders of United Sanders Stores, Inc. In this letter, at great length, the holder of stock, alleged as having already been defrauded in the purchase thereof, is now exorted to exchange his stock for that of the U-Save Holding Corporation. This count also concludes that the statements made in said letter were false and untrue (50).

In Count Twelve, furthermore, a letter is included

from United Sanders Stores, Inc., dated at Phoenix, Arizona, on *January 10, 1931*, addressed to the stockholders of the company, it also refers to the activities of U-Save Holding Corporation. The count concludes that the statements in the letter were false and untrue (56).

Count Thirteen (56) discloses the associates of H. D. Sanders. This count includes a notice to the stockholders of United Clarence Saunders Stores, Inc. (56) and announces the forthcoming activities of U-Save Holding Corporation. It advises the stockholders in glowing terms as to the experience and reputation of H. D. Sanders, refers to him as a merchandising genius which has seldom been equaled and reports that associated with H. D. Sanders will be K. C. VanAtta, A. M. Kaler, Warfield Ryley, Cy Measday, J. S. Mackin and A. E. Sanders, the last being contemplated as a continuing member of the board of directors in charge of the Financial Department. The statement in this communication is also charged as false (65).

It will be seen that the foregoing uses of the United States mails are not only included in the counts mentioned as constituting the gist of the offense by the act of mailing but are, also, used to describe false representations. There is no charge of falsity as to the Driscoll letter in the first count. Thus, and thus only, the purpose of the allegations in the first count of the indictment respecting H. D. Sanders and his associates, the U-Save Holding Corporation, the acquisition of control and the removal of the merchandise becomes plain and with it the revelation that these allegations constitute beyond peradventure of doubt a separate and distinct scheme to be supplemented by allegations of *false pretenses made in the*

letters in the ensuring counts, not included in the first count and made the basis of a separate charge. "The persons to be defrauded," in addition to the corporation, under these allegations and as disclosed by the succeeding counts just discussed, are persons who have already parted with their money in the purchase of the stock and debentures by virtue of other representations previously made which is the avowed intent charged against the defendants in the first count of the indictment. (See page 7 of the printed transcript, second paragraph.)

Therefore, the allegations in the first count respecting the activities of H. D. Sanders and his associates do constitute a separate and distinct offense, in connection with which separate and distinct representations were made, charged as being false, and for which, alone, the defendants could be prosecuted. It would be idle to assert that the allegations under discussion could be regarded as mere surplusage when, upon the basis of such facts, the defendants could be compelled to stand trial. Certainly if some of the defendants participated in a scheme to obtain money in the original sale of the stock and, subsequently, others of the defendants only participated in the U-Save Holding deal and the effort to obtain the stock after it had been purchased, one class of defendants could be tried and convicted for one offense and the other class of defendants for the subsequent offense. Connecting the U-Save Holding Corporation events with the representations set forth in the letters included in the subsequent counts of the indictment, they constitute the undoubted basis of a separate and additional scheme or artifice in the furtherance of which the use of the United States mails would constitute an offense under Section 215 of the Criminal Code.

In the first count the people named as the persons to be defrauded are fifteen in number. In counts Ten, Eleven, Twelve and Thirteen the named persons are ten in number. Inasmuch as the fifteen names were known to the Grand Jury, as set forth in the first count, it is evident that five of them were not "persons to be defrauded" by means of the H. D. Sanders' transactions and representations. Therefore, the parties to be defrauded are not identical. The initial effort to acquire the property of the stockholders, i. e ., their certificates of stock in exchange for holding company stock, according to Count Thirteen, was on October 6, 1930 (58) which effort continued, according to Count Ten, at least to February 19, 1931. In the first count of the indictment the letter constituting the gist of the offense was dated April 9, 1930, months before the first steps taken with reference to H. D. Sanders and the U-Save Holding Corporation, but it was the date, however, when the scheme and artifice had been completely devised for the purposes of the first count and prosecution thereunder. Again, in the first count the scheme is alleged as continuing in existence to and including March 19, 1931 (3).

Under such analysis of the indictment it cannot be doubted that the conviction or acquittal of some of the defendants for the scheme to obtain, by false pretenses, the money of the persons to be defrauded in the original sale of the stock would not constitute a defense or prevent H. D. Sanders, or for that matter even appellants, from being tried for the scheme which had for its purpose the obtaining of property from persons who had been already defrauded in their original purchases.

Joinder of charges is made the subject of Federal

statutory provision in Section 1024 of the Revised Statutes of the United States; (U.S.C.A.) Title 18, Section 557. This provision is as follows:

> "Where there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

This Statute was evidently designed for purposes of expedition and convenience. By providing for what may be done under its provisions it is necessarily inferable that several charges against a defendant for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class *may not* be joined together in a single count. Compare: *Arnold vs. United States* 7 Fed. (2) 867, 869.

In *McElroy v. United States*, 164 U. S. 76; 41 L. Ed. 355, the defendants were indicted for an assault with intent to kill one Elizabeth Miller and they were also indicted for an assault to kill one Sherman Miller on the same day, April 16, 1894. They were, moreover, indcited for arson of the dwelling house of one Eugene Miller on May 1, 1894. Three of the defendants were indicted for the arson of the dwelling house of one Bruce Miller on April 16, 1894. The trial court ordered the four indictments consolidated.

The Supreme Court, in passing upon and reversing the judgment of conviction, established a rule neces-

sarily applicable, in principle, to cases wherein defendants are charged with different offenses in a single count. The court said at page 77:

> "The order of consolidation under this statute put all the counts contained in the four indictments in the same category as if they were separate counts of one indictment, and we are met on the threshold with the inquiry *whether counts against five defendants can be coupled with a count against part of them or offenses charged to have been committed by all at one time can be joined with another and distinct offense committed by part of them at a different time.*"

The court said, further, at page 80:

> "In cases of felony the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction. * * * * * Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error."

In *De Luca v. United States* (C. C. A. 2), 299 Fed. 741, the defendants were indicted for conspiracy to defraud the United States by removing cases of opium without paying import duties and they were also indicted for a sale in a package not originally stamped. A motion to consolidate the indictment for

conspiracy and for the violation of the Harrison Act was allowed, the first being against nine defendants and the second against five. The court reversed the judgment of conviction saying at page 743:

> "The effect of a consolidation of indictments is to render the consolidated indictments as one bill with as many counts as there are accusations. McElroy v. United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355; Porter v. United States, 91 Fed. 494, 33 C. C. A. 652. The word 'count' is made use of in the indictment where, in one finding by the grand jury, the essential parts of two or more separate indictments, for crimes apparently distinct, are combined. 1 Bishop's New Crim. Proc. Sec. 421. Where an accused is charged in a single bill with more than one count, it is the grand jury that consolidates the indictments; but, if separate bills are found, the court can do no more than was the privilege of the grand jury, for it has no greater power to consolidate. In the instant case the conspiracy indictment was against the plaintiffs in error and seven others. The indictment founded on the Harrison Act was against the plaintiffs in error and three others. Each indictment was against a definite group. Although it appears that certain of the defendants were members of both groups, others were not, and therefore the groups were distinct. The statute refers to several charges, which shall be against the same person, and when the charges are against more than one person, there can be no consolidation by the court, unless all the defendants are identical in all the indictments."

Speaking of the conspiracy count, the court said at page 745:

"This overt act of sale, as alleged and as pleaded in the indictment, was not in furtherance of the conspiracy to defraud the customs duties. Furthermore, it appears from the record that the sale of 102 pounds of opium was wholly distinct and apart from the conspiracy. The 102 pounds which were sold as proven did not come from the 20 cases. We are satisfied that the two crimes were wholly distinct from each other. They were conceived and perpetrated at different times. While both groups of the defendants might be said to have a similar general purpose in view of trafficking unlawfully in narcotics, this does not justify the consolidation of the charges into one bill and a trial thereof at one time."

In *McLendon v. United States* (C. C. A. 6), 2 Fed. (2d) 660, the defendant was indicted for the violation of Section 215 of the Criminal Code. The court reversed the judgment of conviction, saying at page 660:

"McLendon was engaged in the breeding, buying, and selling of bird dogs. Like every other legitimate business, this gives the trader, if he is so inclined, opportunity to defraud one customer after another by misrepresenting the quality of his goods, or by the great variety of expedients occurring to an ingenious scoundrel; but it has never yet been thought that the 'scheme to defraud' of section 215 of the Criminal Code could be found in *the mere succession of diverse swindles, unrelated save as they had a common stage.* It is not set out in the indictment or claimed in the proofs that McLendon's business was not, in substantial part, legitimate and satis-

factory to his customers; and so, if the indictment is to be held good, we must find in it an allegation of some general fraudulent scheme dominantly characterizing some part of his business."

Speaking further, the court said:

"Nor do we fail to observe the later allegation that the scheme was 'also by false and fraudulent pretenses and misrepresentations to acquire possession of dogs, and fraudulently, unlawfully, and feloniously convert the same to his own use, and thereby deprive the true owner thereof'. Not only are these charges too vague to be the basis of any prosecution, but there is no connection set out in the indictment, or otherwise obvious, between such a plan and the main one charged. There is no bond of unity between the two. To avoid thinking the indictment bad for duplicity, this last-quoted allegation must be disregarded as surplusage."

From the context of the opinion and from the fact that the judgment of conviction was actually reversed, it is clear that the court, by using language to the effect that the "false representations" portion of the indictment must be regarded as surplusage, did not intend to hold that the defect in the indictment could be thus remedied or disregarded for the purpose of sustaining conviction. This portion of the court's language is but a part of the general discussion of the opinion condemning such indictments. When, of course, evidence goes to the jury in support of a portion of an indictment which is bad for duplicity, it then becomes too late to attempt to deal with such portion as surplusage. By the introduction of evidence the United States attorney elects to

stand by his bad pleading and to place the acts erroneously charged before them, taking the consequences of a verdict which may be the result, in large part, of that portion of the proof which sustains one of the double aspects of the indictment.

In *Beaux Arts Dresses v. United States* (C. C. A. 2), 9 Fed. (2d) 531, an indictment was returned in three counts, the first charging conspiracy to conceal assets from the Trustee in Bankruptcy, the second charging the corporation with concealing assets and the individual defendants with aiding and abetting such concealment, and the third charging the use of the mails in execution of a scheme to defraud by obtaining credit in the aid of a false financial statement.

The question of misjoinder of offenses, as in the case at bar, was raised in the opening of the trial, renewed at the end of the government's case and at the close of all the evidence. The court held that *acquittal* on one misjoined count cured the misjoinder and said that "the duplicity of the indictment has been cured by the verdict of guilty *as to one offense only.*" In passing upon the question, however, the court said at page 533:

> "The proof to support the charge of concealing assets and conspiring so to do was of necessity different from the proof in support of the charge of using the mails in furtherance of a scheme to defraud. To prove a concealment of assets, or a conspiracy so to do would require proof of the filing of the petition in bankruptcy, adjudication in bankruptcy, appointment of the trustee, and the concealment of assets which should have been delivered to the trustee or an

agreement and understanding between the defendants below to do these things or have them done, and the doing of an overt act. To prove fraud in the use of the mails would require proof of a scheme to defraud being devised and the defendants below using the mails in execution thereof. In the latter crime, the conspiracy may be proven, and yet no proof of fraud having been actually committed. In concealing assets, fraud is an element necessary to establish guilt.

What we said in the De Luca Case, supra, is controlling here. There we held an indictment fatal which charged a conspiracy to defraud the United States of duties on opium, and also in another count charged the offense of unlawfully selling opium. The charge of using the mails here involves the sending of a false financial statement. The mailing of such statement could not be in furtherance of a conspiracy to conceal assets from the trustee, or of the substantive offense of actually concealing assets. The third count of the indictment was improperly joined with the first and second, and under McElroy v. United States, 164 U. S. 80, 17 S. Ct. 31, 41 L. Ed. 355, and De Luca v. United States, 299 F. 741, there was a misjoinder."

And so, in the case at bar, the proof to support the charge of the wrongful taking of the assets from Arizona to California would be of necessity different from the proof in support of the charge of using the mails in furtherance of a scheme to defraud. Moreover, proof of the events which followed the appearance of H. D. Sanders and his associates, upon the scene—which proof also demonstrated that the appellants had no connection with these circumstances,

—was also of necessity different from the proof in support of the charge that the defendants devised a scheme to obtain money in the sale of the stock and debentures to the persons to be defrauded, by false representations.

The case of *Creel v. United States* (C. C. A. 8), 21 Fed. (2d) 690, is squarely determinative, in this connection, of the case under review. There the defendant was convicted of violating the National Prohibition Act. Each of the two counts of the information charged both the "selling" and "furnishing" of intoxicating liquor. The judgment of conviction was reversed, the court saying at page 690:

> "Duplicity is the joining in one count of two or more distinct offenses. The question of duplicity may properly be raised by demurrer. Lemon v. United States, 164 F. 953 (C. C. A. 8); John Gund Brewing Co. v. United States, 204 F. 17 (C. C. A. 8); Wright v. United States, 227 F. 855 (C. C. A. 8); United States v. L. & N. R. Co. (D. C.) 165 F. 936."

At page 691 the court said:

> "In the instant case the allegations do not set forth different modes of commiting the same offense, but they set forth the commission of two different offenses. It is, of course, possible to furnish without selling; and it is also possible, though not so frequent, to sell without furnishing.
>
> It is suggested that the word 'furnish' may be disregarded as surplusage. We do not think this can be done. Words adequately charging a distinct offense cannot be rejected as surplusage. *If they could, the vice of duplicity in criminal*

pleading could be practiced with impunity. The language of the information, adequately charges two distinct offenses. If the words 'and furnish' are stricken out, there remains an adequate charge of sale. If the words 'sell and' are stricken out, there remains an adequate charge of furnishing. Leaving the language as it is, there are adequate charges of both sale and furnishing. The rule is stated in 31 C. J. 774, Sec. 334, as follows: ' * * * Where separate offenses are sufficiently charged, none of them can be rejected as surplusage in order to support the charge as of another.' * * * * * * *

Nor can we assent to the contention that the duplicity was a mere technical defect, to be disregarded under Section 1025, Revised Statutes (U.S.C. tit. 18, Sec. 556 (18 USCA Sec. 556), and section 269, Judicial Code, as amended (U.S.C. tit. 28, Sec. 391 (28 USCA Sec. 391; Comp. St. Sec. 1246). The defect was one of substance, and not within the purview of either of those statutes.

We are constrained to hold, therefore, that there was a joinder of distinct offenses in each of the counts of the information, and that the demurrer should have been sustained on that ground. * * *"

So in the case now under review it was possible to sell the stock and debentures by representations without illegally acquiring control of the company or trading the holders out of their shares and it was also possible so to acquire control unlawfully and trade shareholders out of their shares without making original unlawful sales.

In *Lemon v. United States* (C. C. A. 8), 164 Fed. 953, the indictment, in one and the same count, charged both the devising of a scheme to defraud and a conspiracy to do the same thing. As to this the court said at page 958:

> "It is also urged that the indictment is bad for duplicity; that it embodies in one and the same count a charge of devising a scheme to defraud, and of conspiring to do the same thing. A most casual reading of the indictment discloses that both of these charges are made in each and every count of the indictment. They are therefore double, and would have been held bad for duplicity if seasonably challenged on that ground, either by a motion to quash, demurrer, or motion to elect, which are the three approved methods for doing it. Bishop's New Criminal Procedure, Sec. 442. The rule against duplicity stands in the law as a privilege which may be invoked or not at the election of the defendants. 1 Bishop's New Criminal Procedure, Sec. 442. But the defendants, instead of invoking this privilege, went to trial without objection on this ground, and the court tried the case as a scheme to defraud. It was then too late to raise this objection."

Appellants in the instant case, as has been seen, *seasonably and repeatedly* challenged the indictment.

In *United States v. Smith*, (D. C. W. D. Ky.) 152 Fed. 542, the court held that a count of an indictment charging both embezzlement and misapplication of the funds and credits of a national bank was bad for duplicity, saying at page 545:

> "The ninth count is open to similar objections,

with the additional one of duplicity, as this count charges the embezzlement, as well as the willful misapplication, of the 'funds and credits' of the bank, without setting forth any particular description of either, and without any separate statement as to the amount either of the 'funds' or of the 'credits' which had thus been embezzled or misapplied."

The cases upon the subject of duplicity are infinite in number and variety. No case has been found where the pleader has been permitted deliberately and at length to inject into one count of an indictment a set of circumstances having no relation to the charge mainly averred and which constitutes, in effect, a separate offense and the basis of separate prosecution. The district attorney, under no sound theory, may rest content with what has been denominated a "Mother Hubbard" indictment and catch defendants somewhere within its voluminous folds.

The court's attention is respectfully directed to the following illuminating cases:

Coco v. United States (C. C. A. 8), 289 Fed. 33, 34, 35;

Pointer v. United States, 151 U. S. 396; 38 L. Ed. 208;

United States v. Blakeman (D. C. N. D. N. Y.) 251 Fed. 306;

United States v. Morse (C. C. S. D. N. Y.) 161 Fed. 429, 437;

United States v. Morris (C. C. D. Ore), 18 Fed. 900, 903;

United States v. Hopkins (D. C. S. D. Fla.) 290 Fed. 619, 620;

Beck v. United States (C. C. A. 2), 145 Fed. 625.

To treat as surplusage the paragraphs of the indictment relating to H. D. Sanders and his associates, the organization of the U-Save Holding Corporation, the acquisition of control of the company and the removal of its merchandise from Arizona to California, important and deliberate allegations, would be to strike them from the indictment as effectually as if a line had been physically drawn through the words, and with greater prejudicial effect. If the indictment be treated as if these allegations were nonexistent, the court would be proceeding under a count not given to and certainly not presented by, the grand jury. Who can say with what seriousness the grand jury regarded these averments or whether or not the indictment would have been returned at all in the absence of the alleged manipulations with the corporate stock and with its control, and in the absence of the apparently brazen removal of over $100,000.00 of merchandise.

As was said in the matter of *Ex parte Bain, Jr.*, 121 U. S. 1, 13; 30 L. Ed. 849, 852, in speaking of the propriety of an order of the trial court striking from an indictment the words "The Comptroller of the Currency and," and in holding such action invalid:

> "The learned judge who presided in the circuit court, at the time the change was made in this indictment, says that the court allowed the words "Comptroller of the Currency and" to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the

motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change in the indictment, upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. *But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument.* While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him."

This court in *Stewart v. United States* (C. C. A. 9), 12 Fed. (2d) 524, held that an assignment of error based upon the action of the trial court in striking from an indictment as surplusage the words "feloniously and," in one place, and the words "and feloniously," in another, was well taken. After quoting with approval the opinion by Mr. Justice Miller in the *Bain* case (121 U. S. 1), the court said at page 525:

> "In the course of the opinion there is some discussion of the question as to whether the grand jury would have returned the indictment with the stricken words omitted, but an examination of the entire opinion shows very clearly that the decision was based upon the broad ground that under English and American law no authority exists in a court to amend any part of the body of an indictment, without reassembling the grand jury, unless by virtue of statute."

The court then quoted from the opinion in *Dodge v. United States*, 258 Fed. 300, as follows:

> " 'At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word 'mutiny' from the first paragraph of the second count. Counsel for the defendant at once said "No objection." The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted."

After the opinion had been rendered by this court in the *Stewart* case, the indictment was restored to its original form and the defendants again tried and convicted. The judgment was affirmed by this court in 16 Fed. (2d) 863. Even with such restoration, however, Judge Rudkin entered a strong dissent saying, in part, at page 864:

> "I dissent. The conclusion of the majority must be sustained, if sustainable at all, on one of two theories: First, that, in addition to the void indictment before this court on the former writ of error, there lurked some place in the

records of the court below a valid indictment; or, second, that that court now has power to make a valid indictment out of a void one. Either conclusion is, in my opinion, utterly inconsistent with the language of the Supreme Court in Ex parte Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849."

In *United States v. Wills* (C. C. A. 3), 36 Fed. (2d) 855, the court distinguished between unnecessary words which may be rejected as surplusage and language descriptive of the offense. The court said at page 858:

"'Undoubtedly there is a general rule of law that all unnecessary words may be rejected as surplusage, if the indictment would be good upon striking them out. But that rule is not an unqualified one. *An interwoven limitation upon the operation of that principle is that, if the immaterial averments are in any sense descriptive of the identity of what is essential, then they cannot be rejected as surplusage.* Wharton's Criminal Ev. Sec. 138. In U. S. v. Howard, Fed. Cas. No. 15, 403, Mr. Justice Story said: '* * * No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage.'" * * * * * * The object of an alleged conspiracy is that which identifies and describes the particular unlawful agreement or conspiracy with which the defendant stands charged. *No part of that description may be ignored as surplusage.* It must be proved as laid."

While it is obviously possible to strike mere words or even expressions from an indictment as surplusage, it is inconceivable that whole paragraphs positively averred as constituting part of the offense can be so perfunctorily disregarded. So to do would be to accomplish by indirection that which could not be done directly,—would be to inject into a criminal trial an insidious danger not realized or even discoverable until too late.

The vice of duplicity in the indictment was aggravated in its prejudicial effect when the district attorney elected to introduce evidence of the H. D. Sanders and U-Save Holding Corporation events. Instead of abandoning these allegations, therefore, the district attorney stood by them.

When this evidence was introduced, over objection, and the court refused to strike any part of it, the die was cast and the case went to the jury with evidence of an alleged scheme to obtain money from prospective buyers of stock by false pretenses charged against all of the defendants and with evidence of another allegedly fraudulent design to obtain the shares so originally sold from them, to acquire control and to remove $100,000.00 of property. The defect of duplicity became thus sealed into the case.

II.

THE FINANCIAL STATEMENTS PREPARED BY L. D. NULL, BEING GOVERNMENT'S EXHIBITS 89, 90 and 91, WERE ERRONEOUSLY ADMITTED IN EVIDENCE. (Specifications of Error 4, 5, 6).

Having introduced evidence of the representations made to buyers or prospective buyers of stock and

debentures of the corporation and having shown that dividends were paid for the period ending December 31, 1929 and for the period ending June 29, 1930, the Government next sought to demonstrate that the representations were false and that the payment of dividends was made out of capital or, at any rate, not out of earned surplus. The obvious method of establishing falsity is, of course, to prove the truth. This lay in the very heart of the Government's case.

In its effort to show the true financial condition of the company the Government succeeded in introducing in evidence, over objection, the so-called Null summaries or financial statements. Exhibit 89 is a profit and loss statement for the year 1929 showing the cost of goods sold, the selling price and expense of operation, in general totals, with a computed resulting loss from operations (366). Exhibit 90 is a similar profit and loss statement for nine months ending September 30, 1930 (374). Exhibit 91 purports to be a balance sheet indicating assets, liabilities and net worth as of September 30, 1930, with the accountant hesitant and doubtful as disclosed by his scratched figures and his careless insertion of the line, "Net Worth September 30, 1934" (378).

It is impossible to tell from any of these exhibits exactly what the financial situation was *on any date* or at any time prior to the end of the respective periods indicated. A marked drop in the market at any time during the period might have required large quantities of goods to be sold at a loss and might have resulted in the small margin of gross profit. A great variety of questions appear on the face of the profit and loss statements. What, for example, were the items that made up the "unclassified expense" of $43,859.67 (366)? Were there on hand at the end of 1929 large quantities of merchandise

bought low and held for a rising market? Or had the market actually risen on important quantities of goods with resulting favorable differences in price showing a profit? What are the items that go into the total traveling expense of over $7,000.00 (366)? Does this include trips of A. E. Sanders in connection with his other projects? What is the breakdown of the depreciation item? It is not even possible to tell whether the sub-totals are correctly added.

Aside from the generality of the exhibits, appearing on the face thereof, the documents were clearly inadmissible against appellants upon grounds so plainly substantial that the error of their admission is, when the record of the proceedings is known, immediately apparent. Exhibits 89 and 90 were but parts of what was termed an "Auditor's Tentative Report," a document consisting of some two hundred seven pages prepared, not by Null alone, but, as Null stated, by his partner, Wood, and by Ray and Bradford as well (362). Indeed, from appellants' tendered and refused Exhibit G (429, 430) it appears that one Canning and one Bradford also worked upon the audit for a total of two hundred nineteen days. From this refused exhibit it appears, also, that not Null but Walter A. Wood was the auditor who actually prepared the report and had supervision of it (430). Although Null testified that he checked everything exerybody else did, it is inconceivable that he duplicated their efforts in his actual perusal of the same original sources. Nevertheless, by means of his testimony, these sheets were received in evidence over detailed objection, successfully resisting appellants' motion to strike and every other attack made upon them.

It would be idle to contend that appellants had an

opportunity of examining the same sources which took five men a total of over five hundred man-days to accomplish. And it would be equally futile for appellants to offer to the jury the six ponderous volumes which were present in court even if these books were, as they were not, admissible and contained every necessary entry.

Summaries, financial statements and compilations of experts are permitted in evidence where the books and records evidencing facts which may properly be shown are too voluminous and complicated to submit to a jury. But before such expert testimony is admitted the books and records underlying the expert statements must themselves be admissible as to the party against whom they are offered. This would seem to be self-evident.

Upon this branch of the argument appellants make the following contentions:

(1) Even if all of the books and records underlying these exhibits were actually available, they would not be admissible against appellants because it was affirmatively shown that appellants had no connection with them, no knowledge of them and no control over them. They constituted, therefore, pure hearsay.

(2) Even if the barrier against hearsay evidence be disregarded, no foundation was laid for the introduction of these exhibits, because:

(a) All of the supporting records were not identified and, indeed, were not even in court.

(b) Such books as were in court were themselves but summaries and would not establish the correctness of the exhibits.

(c) Those of the books as were present in court were not properly or fully identified.

(d) The books and records of the company were shown to be incorrect and to have been kept under the supervision, for a considerable period, of a self-confessed manipulator.

(e) None of the books and records from which the exhibits were compiled was offered or introduced in evidence.

(f) No opportunity was given to appellants adequately to examine and verify the summaries or to examine even those six volumes which were piled upon the table of the Government counsel.

It may be laid down as an indisputable postulate to the following discussion that before expert summaries of books and documents are admissible, sufficient evidence must first be given demonstrating the admissibility in evidence of the books and documents themselves. In other words the admissibility and competency of an expert summary depends upon the admissibility of that which the document purports to summarize. Moreover, men whose property, and especially whose liberty, are in danger should be given recourse to the same sources of information possessed by the accountant in preparing his computations.

In a leading case upon the subject, *Phillips v. United States* (C. C. A. 8), 201 Fed. 259, the court said at page 269:

"So far as the error assigned as to the admission of the expert testimony bearing upon what the books showed, it may be stated that it is

proper for an expert accountant to give a summary of books and documents, where the items are multifarious and voluminous, and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements. Wigmore on Evidence, Sec. 1230. We think, however, that the true rule is that before such expert testimony may be given the books or documents must be public records, or, if they are private books of account or documents, that sufficient evidence must first be given to admit the books or documents themselves in evidence, unless the books or documents are admitted to be correct. Otherwise, items in books of account might be given in evidence through the testimony of an expert accountant, when the account books themselves would not be admissible. This would seem to be wrong in principle and dangerous in practice.

For the error in the admission of the books of the Hanover National Bank, and in allowing an expert accountant to testify as to what they showed, in the absence of testimony which would allow the books themselves to be admitted, the judgment of the court below is reversed, and the case is remanded to the United States District Court for the Eastern District of Oklahoma, with directions to grant a new trial."

The evidence for the Government conclusively proved that appellants had no connection with, knowledge of, or control over, the books of account and records of the corporation. The company was actively engaged in the wholesale and retail grocery business, in the conduct of which it made leases for stores and warehouses, it acquired fixtures, equipment and

automobile trucks, it made large purchases of merchandise for resale and sold both at wholesale and retail, it paid salaries and wages in a large amount, contracted for advertising and, in short, conducted the transactions usual to such a business. With no part of this did appellants, under the express and repeated testimony of the Government witnesses, have any connection or participation.

Brandt testified that appellant, Gus Greenbaum, "had nothing whatsoever to do with the entries in the books of the stores company." And he said that appellants, William Greenbaum and Charles Greenbaum, did not "have anything whatsoever to do with the books and records of the stores company, nor with the entries in such books and records" (334). At another point in his testimony he said: "Their (appellants) books were not kept at the warehouse, as the Bond and Mortgage Corporation was separate and apart from the stores company. The Bond and Mortgage Corporation had no direction or control over what entries should be made in the books of the stores company as that was exclusively under my control and under my direction" (332).

A. E. Sanders himself said that appellants' company, the Bond and Mortgage Corporation, "was not connected with our company at any time" (348). Thus, far from attempting to establish some measure of contact between appellants and the books and records, the testimony on behalf of the Government negatived such a possibility.

When the undeniable facts are examined it will be found that the leeway granted to counsel for the Government by the trial court surpasses understanding. Even if the hearsay rule be disregarded, the

Government's own case demonstrates that there was no foundation for the exhibits under consideration. Null testified that in the preparation of the audit he examined literally hundreds of documents and sources of information (363), and, although he stated that he could prepare the exhibits from the books in court, this would be possible only because he had examined and checked the underlying original records. He said "We examined many other books and records other than the exhibits which are here in court. In order to prepare the tendered exhibit correctly you would have to examine those other records which are not now here" (364). Again he said "*The basic books, records and memoranda which underlie that financial statement are not in court and since the trial opened they have not been in court, that is, not all of them.*" Yet again he stated "I would not assume that the books and records on the table are sufficient underlying data to make up a verified profit and loss statement from. In other words in order to verify, I would say certify, to that statement as to its true and correct condition, those books are not sufficient" (369).

Speaking of Government's Exhibit 91 he said, "I took this balance sheet directly from the books there on the table, and the information contained there, *plus* the information in my previous experience with the underlying records, is what went to make up this balance sheet. Those books which are not here were the records upon which the entries in this book were based" (373). Then he made the surprising assertion, "I would think that Government's Exhibit 89 for identification is true and correct in its entirety. I wouldn't say that there are several items in that statement which do not coincide with the book entries of the stores corporation because this is a matter of

interpretation. I might draw one conclusion and you another. That is not true of my entire audit" (365).

The sum and substance of Null's testimony in this connection therefore is, in effect: These are summaries which I prepared but which I cannot verify and which you cannot verify as to correctness without underlying records which are not here. You must, therefore, take my word for it since you cannot accurately check me back.

It was conceded by the Government on the trial that the books of the corporation which were present in court, but not introduced in evidence, were themselves but *summaries* of other books and records of original entry. After such a statement had been made by one of counsel for the Government the court interrupted saying, "You don't mean that"? Whereupon counsel stated, "*These books are a summary, your Honor, of the original entry books*" (370).

As has been said there was no identification whatsoever of the books of account physically present for the first ten months of the company's existence. Brandt was not employed until September 15, 1920 (251), while the corporation was organized in October of 1928. The record is uteerly silent as to any identification of any book or record or of any entries made therein prior to Brandt's employment. After he became employed he did not have supervision of the books for some indeterminate period, being first engaged as a mere "ledger man55 (251). Indeed, there is no way of telling when the books were opened or when closed. To this extent, therefore, the Null summaries are utterly without foundation.

One of the most important elements which sponsored the shop book rule and followed its development

into modern systems of complicated accounting, is that entries made in books of account regularly kept, in the legal sense, carry with them a circumstantial guarantee of authenticity. This presumption of faithfulness was overcome in the case at bar by the startling admission of the very witness upon whose identification, such as it was, of the books, such as they were, the Null summaries rested. Brandt stated that he had deliberately manipulated the entries in at least one important particular (418). Inasmuch as the testimony of this witness will be analyzed at a subsequent point in the argument, more need not here be said upon the subject. With the words, "Under the promise of A. E. Sanders in Kansas to get funds here I made a fictitious entry and I showed it as a check to Phoenix Packing Company for $5,000.00, and on the duplicate voucher I showed a charge against the Kansas unit" (418), the circumstantial guarantee of authenticity vanished. Enough was admitted by Brandt to create a strong suspicion that not only was the entry fictitious but that it was the means used by him for an outright embezzlement. Notwithstanding the grave importance to the case of Brandt's identification of the books, the court promptly interfered with the full demonstration of his crookedness and permitted his testimony to constitute one of the corner stones of the Government's case.

None of the books and records from which Exhibits 89, 90 and 91 were compiled was offered in evidence by the prosecution, nor were they actually tendered to appellants for examination. No statement was made that the case would close without the actual introduction of those books of account which were present in court and it was, therefore, naturally assumed that they ultimately would be of-

fered in evidence and an opportunity afforded to appellants to examine them and to use them for the purpose of cross-examining Brandt and Null.

When Null took the witness stand for the purpose of laying the foundation for the introduction in evidence of Exhibits 89, 90 and 91, he testified that he spent some six months examining the books of the company and made a profit and loss statement which he said "I have here in my audit" (360). The audit referred to was a document consisting, as has been said, of two hundred seven pages, bore the case number of a case pending in the Superior Court of Maricopa County, Arizona, and was entitled "Auditor's Tentative Report." This voluminous document was handed to counsel for appellants about 11:05 o'clock, A. M., on November 15, 1934, and at 11:10 o'clock A. M., the court stood at recess. At 2:00 o'clock of the same day counsel for appellants announced that they could not even read, much less understand, the two hundred seven pages of computations, whereupon the court took a further recess until 10:00 o'clock, A. M., the following day. Less than one full day, therefore, was accorded to appellants to examine and make a check of the report and, so far as the books of account were concerned, they remained securely in the possession of the District Court Clerk whose office closed promptly at 5:00 o'clock, P. M. (361). It had taken Null and his associates six months (360) and a total of five hundred twenty-eight man-days (430) to make the examination of the affairs of the company upon which the general profit and loss statements and the balance sheet were founded. Yet appellants were expected to become, in less than six hours, sufficiently familiar with the sources of information back of these financial statements (the records of original entries not being present, identi-

fied or even fully described) to enable their counsel to conduct an adequate cross-examination. It is believed that this court will have little patience with such an unconscionable restriction of the rights of men standing trial for their liberty.

Expressions are occasionally found in the books to the effect that the same rules governing the introduction of books of account and expert summaries based thereon do not apply to a case where the Government seeks to establish the financial condition even of a third party as a fact collateral to the main issue. Such expressions, usually *dicta*, must, however, be examined in connection with the particular proceedings before the court. Examples of such cases will be analyzed in this discussion.

No matter what may be the opinions of other jurisdictions, this court is committed to the view which is resolutely protective of the rights of persons accused of a criminal offense.

In *Osborne v. United States* (C. C. A. 9), 17 Fed. (2d) 246, the defendants were indicted and convicted for violating the Mail Fraud Statute. While the court affirmed the conviction under the particular facts before it, it laid down the following rule, quoting from *Chan Kiu Sing v. Gordon*, 171 Cal. 28, 151 Pac. 657:

> " 'In order to lay the foundation for the admission of such evidence it must be shown that the books in question are books of account kept in regular course of the business, that the business is of a character in which it is proper or customary to keep such books, that the entries were either original entries or the first perma-

> nent entries of the transactions, that they were made at the time, or within reasonable proximity to the time, of the respective transactions, and that the persons making them had personal knowledge of the transactions, or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of the business.' "

After quoting from the leading case of *Chaffee & Co. v. United States*, 18 Wall, 516, 21 L. Ed. 908, the court said at page 248:

> "Measured by this rule it is quite apparent that a proper foundation was not laid for the admission of all the books and records received in evidence; and, unless shown to have been accurately kept, *the books of a corporation are not ordinarily admissible against its officers and stockholders*, in the absence of evidence tending to show that they had something to do with the keeping of the books, had knowledge of their contents, or such connection with the books as to justify an inference of actual acquaintance therewith."

It must be noted that, in the *Osborne* case, the false pretenses related to the sale of sections or lots in two cemeteries owned by corporations dominated and controlled by the defendants. One of the principal elements of the case was the sale of the same sections to different purchasers, or what was called "duplications." Upon this subject the court said:

> "There was testimony tending to show that the books containing the records of sales of lots

or sections were properly and accurately kept, and that they were used by the plaintiffs in error or by their employees under their express direction for the very purpose for which they were used by the Government, namely, for the purpose of ascertaining the lots or sections that had been sold to two or more purchasers."

The court said further at page 249:

"Indeed, it clearly appears from the record that these books were the only source to which the plaintiffs in error and their employees could resort and did resort for information concerning the manifold activities in which the plaintiffs in error and the finance company were engaged."

The court concluded that the corporate books of account were in effect the books of a copartnership since the defendants were merely using the corporate vehicle for their activities. In this connection the court said:

" 'The defendants, Cullen and Dennison were the corporation. They owned the stock, and had entire control and ownership of the corporate property. They were, respectively, president and secretary of the corporation. They passed all the resolutions of the corporation, conducted its correspondence, and managed its activities. They were, in effect, partners operating through the instrumentality of a corporation. That they were acquainted with the contents of their books is a justifiable inference. Under such circumstances there was no error in admitting the evidence.' "

Certainly the grounds of admissibility existing in the *Osborne* case are not present in the case at bar.

In *Chaffee & Co. v. United States*, 18 Wall. 516, 21 L. Ed. 908, the defendants were proceeded against in debt to recover a penalty under the Revenue Act for having in their possession distilled spirits for the purpose of sale and with the design to avoid the imposition of duties. In making its proof the government offered in evidence the certificate books of certain collectors of tolls. The court said at page 912:

> "When the books were offered, objection was taken to their introduction, on the general ground that they were hearsay evidence and transactions between third parties. Subsequently, a similar objection was taken to each of the certificates, on a motion to exclude them from the jury.
>
> The books were not public records; they stood on the same footing with the books of the trader or merchant. The fact that the lease was from the state did not change the character of the entries made by the collectors, who were simply agents of the lessees, and not public officers of the state. Their admissibility must, therefore, be determined by the rule which governs the admissability of entries made by private parties in the ordinary course of their business.
>
> And that rule, with some exceptions, not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reach of the process or commission of the court. The testimony of living

witnesses, personally cognizant of the facts of which they speak, given under the sanction of an oath, in open court, where they may be subjected to cross-examination, affords the greatest security for truth."

The case of *Hagan Coal Mines Inc. v. New State Coal Co, et al.* (C. C. A. 8), 30 Fed. (2d) 92, while a civil case, is clearly illustrative of the better-considered rule. The court said at page 93:

"The evidence which was received over objection consisted of several statements purporting to show: Total sales and expenses of defendants for the contract year and also for several years prior; amount of coal delivered by plaintiff and commissions earned thereon by defendants; selling expenses and comparison thereof with prior years; allocation of selling expenses to wholesale business; total sales at wholesale, including coal bought from others than plaintiff; cost per ton of selling the additional coal. These statements had been prepared by a public accountant from books and documents which were furnished him by defendant. The books and documents were present in court. They were identified as being books and records belonging to defendants. There was no objection to the summaries as such, but the objection was that the books themselves were neither offered and received in evidence nor was there a sufficient foundation laid for them to be so received. We think the objection should have been sustained. In the absence of statute, the general rule governing the introduction of books of account of a party in his own favor is that a foundation must be laid by proof of their character, authenticity, correctness and regular-

ity. 22 C. J. Sec. 1035, p. 864; *Phillips v. United States*, 201 F. 259 (C. C. A. 8); *Pabst Brewing Co. v. E. Clemens Horst Co.* (C. C. A.) 229 F. 913.

Plaintiff places reliance upon the case of *St. Paul F. & M. Ins. Co. v. American Food Prod-Co.* (C. C. A.) 21 F. (2d) 733, in which this court held that in cases where necessity required books of account and summaries therefrom might be received in evidence without the testimony of the persons who made the original memoranda from which entries in the books were made, providing there existed circumstantial guaranty of trustworthiness of the books. In that case the evidence showed that the books from which summaries had been made were regular books of account; that the entries therein were made in the regular course of business from data sent in by sales agents; that the entries in the books were correctly made. The persons who furnished the original data were not available as witnesses."

In *Beck v. United States* (C. C. A. 8), 33 Fed. (2d) 107, the defendant was convicted for violation of Section 215 of the Criminal Code. In speaking of the books of account which had been introduced in evidence against the defendant, the court said at page 113:

"These books, however, were not identified in accordance with the rule laid down by this court in *Phillips v. U. S.* (C. C. A.) 201 F. 259, where the records of a national bank, identified by its city manager, were excluded. The court concluded a long summary of the cases by saying:

'If this rule obtains in civil cases, it should

not be relaxed in criminal cases. It results, therefore, that the books of the Hanover National Bank were improperly admitted in evidence, in the absence of the testimony of some person who either had some knowledge of the correctness of the entries made, or some knowledge of the original transaction upon which the entries were founded, and in the absence of testimony showing that the person or persons who possessed such knowledge were either dead, insane, or beyond the jurisdiction of the court.'

"This rule has been recently applied in *Hagan Coal Mines v. New State Coal Co.*, 30 F. (2d) 92 (8 C. C. A.). Before the books were admissable in this case, there should be some showing, by competent evidence, that the entries therein are correct, and reflect, as far as they purport to do so, the true condition of the corporation, or its activities."

The case of *Barrett v. United States* (C. C. A. 8) 33 Fed. (2d) 115 arose out of the same set of facts as the Beck case just discussed., and this is the authority relied upon below. The identification of the books of account was meager. The bookkeeper who made a few of the entries was not in court, nor was his absence explained. But the court said that the objection of the defandant that the corporate books were not binding on him because he was neither an officer nor stockholder of the company was not sound. Said the court at page 115:

"The government does not offer the books as binding on any one; the government seeks to show how much money came in to the corporation, and where it went, a circumstance bearing

> on fraudulent intent. *If the books, properly identified,* assist in proving that fact, they are admissable whether Barrett knew of the books or not."

This broad statement, however, was greatly narrowed by the next sentence of the opinion as follows:

> "To make the *fact* of receipts and disbursements material, the government, of course, must show that Barrett knew, at least in general, how the money was being spent."

The important language of the opinion, however, is found in the words, "*if the books are necessary evidence, they must be identified as required by the case of Phillips v. United States* (C. C. A.) 201 F. 259." This language is directly applicable to the instant case because the books of the corporation contain the evidennce which would demonstrate the truth or falsity of representations as to financial condition. The proof of falsity being indispensable and that proof resting upon the corporate books, they become inescapably, "necessary evidence" and, therefore, the rules of identification, familiarity with the facts, regularity of their keeping and the faithfulness of their contents must be followed.

As was stated in *Kaplan v. United States* (C. C. A. 2), 229 Fed. 389, 390, "the crucial question, however, is whether or not the defendant devised a scheme to defraud by using false statements of his financial condition to induce the sale to him on credit of a large quantity of goods which, had the truth been known, would not have been sold. Here, the controlling consideration is the truth or falsity of the statements."

In *Pabst Brewing Co. v. V. E. Clemens Horst Co.,*

(C. C. A. 9), 229 Fed. 913, an action was brought to recover damages for the breach of a contract for the sale of hops. With reference to the attempt of the plaintiff to prove damages, the court said at page 918:

> "One of the witnesses for the Horst Company was permitted to testify from figures compiled from the books of the Horst Company, showing office expenses in New York and Chicago, insurance charges, warehouse charges, freight charges and other miscellaneous charges, and that the 2,000 bales of hops sold at an average net price of 13.66 cents per pound over and above these various charges. This testimony was clearly inadmissible. The books themselves afforded the primary evidence of their contents, and as long as they were accessible and unaccounted for any evidence as to what they contained or showed was secondary and incompetent. This rule is elementary."

In *Worden v. United States* (C. C. A. 6), 204 Fed. 1, the defendants were jointly indicted on a charge of conspiracy to defraud the United States in the purchase of public lands. The books of account of one of the defendants and of the corporation which was involved were admitted in evidence. The court said at page 6:

> "Were the corporation the opposite party here, entries on its books would be competent evidence when in the nature of admissions, and without the necessity of strict authentication beyond establishing the identity of the books. *Foster v. U. S.* (C. C. A. 6) 178 Fed. 165, 175; 101 C. C. A. 485, 495, and authorities cited. The

corporation, however, is not here the opposite party; there was no affirmative proof that the books were correctly kept; and while the rule is well settled that entries in the books of a corporation showing dealings between it and its managers are competent evidence against the latter, even in a criminal prosecution, on proof of such connection and familiarity with the books as to justify an inference of actual acquaintance with their contents, as being admissions or assertions of the facts stated therein *(Foster v. United States*, supra; *People v. Leonard*, 106 Cal. 302, 39 Pac. 617; *Olney v. Chadsey*, 7 R. I. 224; *Bacon v. United States*, 97 Fed. 35, 40, 38 C. C. A. 37), yet such is, we think, the only theory on which the entries in question can be held competent evidence against the defendants. *State v. Ames*, 119 Iowa, 680, 684, 94 N. W. 231; *Lang v. State*, 97 Ala. 41, 46, 12 South. 183; *Bartholomew v. Farrell*, 41 Conn. 107, 111.

"The record, we think, fairly presents the objection that sufficient connection was not shown between defendants and the books of the lumber company to make the book entries competent evidence."

At page 8 the court said:

"It clearly appears that Person had nothing to do with keeping the books. He was simply superintendent, and there is nothing to indicate that he knew anything about bookkeeping or that he paid any attention to it, or that he directed any of the entries in question. Moreover, he severed his connection with the company as early as January 1, 1907 (if not earlier), and a large

number of the bookkeeping entries put in evidence (including those claimed to show that payments, at or before the execution of final proofs, were made to at least five entrymen) are later than that date, although the applications of the entrymen for land purchases were all made before Person retired. The showing was not such as, in our opinion, to justify a ruling that the bookkeeping entries were competent evidence against him. Person was thus prejudiced even if (as is not quite clear) he failed to save the question of the competency of Worden's books. As to Worden: There is no evidence that he had at any time anything to do with the bookkeeping, or even that he ever looked at the books. * * * Unless the mere fact of Worden's presidency and management of the company raised a legal presumption of his acquaintance with the book entries, thus putting upon him, in defense of a charge of crime, the burden of rebutting such legal presumption, we think the books cannot, in the peculiar state of this record, be held as matter of law competent evidence against him. *We have found no persuasive decision sustaining such legal presumption (in the absence of statutory requirement of correct bookkeeping) except on proof that the books were kept under the instruction, direction or supervision of the person against whom the entries are offered, or that such person presumably had examined the books or in some way obtained actual knowledge of the entries.*

The court, in the *Worden* case, distinguishes the cases where the books of account of a national bank are permitted in evidence in a prosecution of the president for making false reports of the bank's con-

dition, not only upon the ground that such defendant is the chief executive and as such actually has control and direction of the banks affairs, but, also, because the Act of Congress enjoined, under severe penalties, that the books should be truthfully kept.

In *Norcott v. United States* (C. C. A. 7), 65 Fed. (2d) 913, the government in a prsoecution under the Mail Fraud Statute offered in evidence an audit of the books of H. O. Stone and Company made by an auditor employed by the Securities Commission. The court, in holding the audit inadmissible, said at page 916:

> "It is further contended by appellants that the court erred in excluding an audit of the books and appraisal of the assets of H. O. Stone and Company made by an auditor and an appraiser of the Securities Commission of the State of Illinois. These documents were not identified by their respective authors, and so far as the record discloses, the authors were not available for cross-examination, and no one testified as to the accuracy of the documents. Under those circumstances the audit and appraisal were properly excluded as hearsay evidence."

In *Singer v. United States* (C. C. A. 3), 58 Fed. (2d) 74, the defendant was prosecuted for evading his income tax. During the trial certain memoranda known as settlement sheets were introduced. The court said at page 76:

> "Original entries of transactions made in the regular course of business when the entrant is dead or otherwise unavailable upon being identified are admissible. Such entries are also admis-

sible when the entrant is present, identifies them and testifies that they are true, though they do not refresh his memory and he has no independent recollection of the truth of the transactions which they record. This rule grew up as a matter of convenience, but, under the exigencies and complexities of modern business, it has become a rule of necessity without which the administration of justice in many matters would be difficult or impossible. The '*J. S. Warden*' (C. C. A.) 219 F. 517, 521, and the many cases there cited. It is clear that these memoranda do not come within the above rule, and it was error to admit them in evidence. Government Exhibit 94 likewise was inadmissible because it was not shown that the entries were made in the regular course of business, nor who the entrant was, nor whether or not he was available for testimony."

In the case at bar, it will be recalled, there was no testimony whatsoever as to entries in the books of the corporation from the time of its organization to the date of Brandt's employment, a period of some ten months' duration. Moreover, Brandt said, merely, that he had made some of the entries and others in the employ of the company had made entries without attempting to identify which of the entries were made by him and which by others.

The following well-put observation of the court in the *Singer* case is entitled to special mention as a bit of legal philosophy in these days too frequently forgotten:

"Innocent men may be indicted and convicted, and guilty men may be acquitted, but both good and bad men are alike entitled to the application

> of the rules of evidence which courts throughout the ages have found to be best for the fair and impartial administration of the law. When these rules, under the stress and strain of a trial, have been violated, it does not cure the injury to reply with the stereotyped argument that it does not appear it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is 'that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless'."

In *McDonald v. United States* (C. C. A. 6), 241 Fed. 793, the court, in reversing the judgment of conviction against one of the defendants for the violation of Section 215 of the Criminal Code, said:

> "Evidence was received as to the contents of the books of the Memphis bank of which Hendrey was president. This bank was a corporation, and the contents of the books of the corporation could not be put in evidence in a criminal prosecution against the president, without a more direct showing of his personal responsibility for the bookkeeping than we observe here."

There are a number of decisions of the state courts which are illuminating upon this phase of the argument and to which the court's attention will be briefly drawn.

In *People v. Mitchell* (Cal.) 29 Pac. 1106, the defendant was convicted of second degree murder. The question become material as to when a certain train arrived and departed from a station. The prosecution introduced a register kept in the station in question

in which the conductor recorded the time of arrival and departure. The witnesses testifying with reference thereto had no actual knowledge of the time of arrival or departure nor was the conductor, who made the record, called as a witness. The court held, first, that the conductor who made the original entries should have been called unless it be presumed that he was absent or dead, and, second, whether the record was properly identified or not, the register itself was but hearsay evidence as to defendant and should have been excluded.

In *Wade v. State* (Tex.), 35 S. W. 663, on a trial for receiving stolen cattle, the government attempted to introduce the records of a railroad company containing details of shipments and brands. The court said:

> "This testimony was upon a material issue in the case. It was evidence introduced for the purpose of showing the possession by the defendant of the head of cattle charged in the indictment, or his acts in regard to the same, which was intended to supplement and corroborate other testimony in the case upon this point; and it was very important evidence on the part of the state, in order to connect the defendant with the crime charged against him. It was illegal testimony, and ought not to have been admitted."

In *State v. McFalin* (Nev.) 172 Pac. 371, it was held that in a prosecution for embezzlement it was improper to introduce books of account where the defendant was not familiar with them and his attention had not been called to the particular acts to which the evidence related.

In *Tipps v. Landers* (Cal.) 190 Pac. 173, it was held that a book of account showing on its face that it was not kept in the usual course of business and did not contain all of the dealings between the parties had no probative value above that of a mere memorandum which could be used for the purpose of refreshing recollection.

There are some cases, upon which appellee will probably rely, which, upon cursory reading, might indicate departures from the rules announced in the foregoing decisions. Upon the analysis in the opinions in such cases, however, it will be found that there are always important factors which lead to the seeming divergence of views.

Such a case, for example, is *Stephens v. United States* (C. C. A. 9), 41 Fed. (2d) 440, in which the defendants were indicted under the Mail Fraud Statute. In that case it appeared that during the trial the prosecution had acquired two hundred fifty volumes of books and records of the company involved in the prosecution, all of which were kept, for convenience, in two rooms in the building where the case was tried. Former auditors and bookkeepers after examining the books and intialing them testified that they were the books and records of the company "*and all such books and records of which they had any knowledge.*" The court admitted in evidence the testimony of two expert accountants, each of whom testified that he had examined *all* the books and records of the company. The court held that it was not essential that the two hundred fifty volumes of accounts be actually introduced, but, it was carefully noted in the opinion, at page 444:

"Before such testimony was given, as appears

> from a colloquy in open court, it was in substance agreed that because the records were so voluminous they need not preliminarily be brought into the courtroom, that they should continue to be held in the rooms referred to, accessible to all parties, that if required the witness should in giving his testimony specify the volume relied upon, and that if, at any time, any book was desired, it would be brought into the courtroom."

Vastly different is the case at bar where, it must be conceded, the books of account present in court were not all of the records of the corporation and were not those records by virtue of which the alleged expert Null could verify his statements.

In the *Stephens* case, moreover, it appeared that one of the accountants gave certain testimony to the effect that certain items of stocks and bonds were carried as assets at highly excessive overvaluations. Null, too, it will be remembered, attempted to place a valuation upon the Saunders franchise agreement and upon the expenses of organization and financing, by which he cut the assets of the corporation several hundred thousand dollars. In the *Stephens* case this court said at page 445:

> "But it appears that he was not only a trained accountant in the strict sense, but that he had had long and wide experience in connection with business where it was necessary to observe and place valuation upon such securities, and, as he put it, he followed the same course in his case in resorting to sources of information touching value 'as I have done all my life in valuing securities'."

Even as to a man so qualified this court said that "the propriety of receiving his testimony in this respect is not entirely free from doubt." Null on the other hand, testified (384): "I said that the franchise in question had no value whatsoever, but I couldn't answer the question as to whether or not the franchise did have a value at the time the original entry setting it up on the books was made." Again he said: (385) "In an operating going concern such as the Saunders Stores a franchise concession has value when it is in use. * * * As to the value of the franchise, I am afraid I could not answer, as I have already said, it had no value and I will have to stick that." And he admitted that any statement he would make would be a long, haphazard estimate, saying in response to the question, "Have you had any merchandising experience?" "I have never owned a grocery store or any other kind of store" (389).

This court, in the *Stephens* case, even regarded it as serious that there was no direct testimony that the books stored in the two rooms and identified by the former employees were the identical books inspected by the witnesses, and the court said at page 444:

> "But as we construe the objections interposed they do not evince any intention on the part of defendants to raise such a question * * * and an inference of such identity would not be unwarwranted."

How different is the case at bar where Mr. Null stated: "The basic books, records and memorandum which underlie that financial statement are not in court, and since the trial opened they have not been in court, that is, not all of them." Note, too, his statement in referring to the books which were present in

court: "In other words, in order to verify, I would say certify, to that statement as to its true and correct condition, those books are not sufficient" (369).

Another case in which it was held that an auditor may testify as to what is disclosed by books of account, although the books may not have been introduced in evidence, is *Butler v. United States* (C. C. A. 10), 53 Fed. (2d) 800. In that case, however, the court, in speaking of the action of the trial judge, said at page 805:

> "The court amply safeguarded the rights of the appellant by requiring the government to furnish him for the use of his counsel and auditor, a copy of the audit; by assuring appellant access to the books, *which were in the court room*, for the purpose of checking the audit; and by affording ample opportunity to cross-examine."

In the case at bar, it will be recalled, the two hundred seven page audit, of which Exhibits 89 and 90 were a part, was in the possession of counsel for appellants for a few hours, no copy being required to be furnished and all of the books not being available.

Furthermore, the court said at page 806:

> "There was no objection at the trial to the sufficiency of the identification, nor is error assigned thereon. * * * No assignment of error being directed to the identification of the books, the bill of exceptions properly omitted a colloquy between court and counsel, which is set out verbatim in the brief, *and in which further identification was waived.*"

In *Krotkiewicz v. United States* (C. C. A. 6), 19 Fed. (2d) 421, one of the grounds of appeal claimed

by the appellant was that error was committed in admitting in evidence *the books of defendant's company* and the testimony of an expert accountant based thereon. The court said at page 425:

> "The ground of this is that the books were not properly identified or authenticated as the records of the company's business, or shown to have been kept by or under the supervision of defendant. * * * The books, with perhaps one exception, were in the court room, and a later witness, Roseroot, testified that he was employed by defendant (who, as the records shows, owned more than 95 per cent of the stock of the company) to open the books; that 'I was in charge of those books until about the end of 1923 * * * until the time of the bankruptcy' (the scheme having been devised and executed, as claimed by the government, in the early part of 1923), and 'as far as I know those entries in that book are correct.' This testimony was apparently accepted by both parties as a sufficient authentication; the defendant did not thereafter renew his motion to strike the books from the record as evidence."

The court concluded its opinion with this significant language at page 426:

> "While authentication might have been more complete than it was by the testimony of this witness, yet apparently both the government and the defendant thereafter thought it had been sufficient, and defendant is not now in position to claim that prejudicial error was committed in this respect."

In the instant case the original objection to each of the exhibits under consideration was based upon the

grounds that sufficient opportunity had not been accorded appellants to examine the sources from which the exhibits were made; that the books, records, data and memoranda that underlie the statements have not been introduced in evidence; that sufficient opportunity had not been accorded appellants to examine the sources from which the statements were made; that there had been no proper identification of the books and records which were in court; that there had been no attempt to produce the people who made the entries or anyone having personal knowledge of the facts; that there had been no showing that such persons were not available; that there was no underlying testimony as to the correctness or regularity of the entries; that the original entries were not in court; that the books and records are shown to be incomplete; that appellants had nothing whatsoever to do with the records which underlie the exhibits and that they were but pure hearsay as to appellants and not the best evidence of the facts shown to be adduced (367, 375). A motion was made to strike these exhibits upon the same ground urged in the objections (449). Appellants cannot be regarded, therefore, as having waived objection and failed to save the error as did the defendants in the *Krotiewicz* case.

Government's Exhibit 91 (and to a certain extent Exhibits 89 and 90) was inadmissible for another reason of controlling importance. This exhibit purports to show the financial condition of the corporation on September 30, 1930, with a summarized statement of the assets, liabilities and net worth or capital (378). The date of the offense as charged in the indictment is coincident with the letter in the first count to Mrs. Addie Driscoll, April 9, 1930 (Government's Exhibit 43) (273). On the date, therefore, the alleged offense was committed and completed because

it is the use of the United States mails which is the gist of the action in furtherance of a scheme to defraud, which, of course, must precede, and not succeed, the date of the offense.

To attempt to justify the admission of the exhibit upon any such ground as having a bearing upon the question of intent would be to ignore its admitted purposes and to disregard its obvious nature. It was introduced with the express object of proving the financial condition of the corporation on September 30, 1930, as a circumstance to be taken into consideration in ascertaining the truth or falsity of the representations. The statement, however, shows a condition almost six months after the date when the offense is alleged as having been committed and completed. Many circumstances causing a condition to exist on September 30, 1930, might well have intervened between that date and April 9, 1930. In times of economic disturbance and declining prices vast changes in asset and liability columns may occur in periods shorter than of six months' duration. The condition of the company as shown by a general balance sheet, on September 30, 1930, is literally no proof of the financial condition of the company six months earlier, or on April 9, 1930. The payment of the dividends took place in June and December of the year 1929, and if this exhibit be taken into consideration in connection with these events it is still further removed from the point of relevancy and competency.

A case exactly in point upon this subject is *Mandelbaum v. Goodyear Tire & Rubber Co.* (C. C. A. 8), 6 Fed. (2d) 818. The plaintiff sued for the difference between the price at which he sold his stock some time after he purchased it, and the price he paid for it, predicating his cause of action upon the ground that

he was induced to make the purchase upon false and fraudulent representations. The facts sufficient for consideration in this connection appear as a part of the opinion of the court as follows, at page 824:

> "The principal error assigned is that the court excluded evidence upon which plaintiff in error relied to show the falsity, not only of the specific representations made, but that the financial condition of the company generally in April, 1920, was not as represented. This evidence may be reduced practically to the reports made by Price, Waterhouse & Co., expert accountants, October 31, 1920, and later in 1921. The court excluded these statements as furnishing no proper index of the condition of the company six months before that time for several reasons. In the first place, these accountants were employed by the bankers who undertook to refinance and reorganize the Goodyear Company. Their object was to make a statement which would justify the safe investment of many millions of dollars by their employers. In so doing they made, naturally, a very conservative estimate of assets. In other words, to use a common expression, they cut them to the bone. They discounted all accounts and bills receivable that were not certain of ready collection and payment. Large losses did occur through the falling off of business and the decline in the price of raw materials. All these things explain in large measure, if not entirely, the difference in values appearing between the Goodyear statements of April, 1920, and the statements of the accountants made in the late fall of 1920 and the spring of 1921.
>
> "Furthermore, the court held that, in view of

> the great financial depression conceded to have taken place in the fall of 1920 and thereafter, a statement of the condition of the company at that time, conditions being materially changed, could furnish no safe guide from which the jury could determine the condition of the company in the spring and early summer of the same year. We think the court was right in so holding."

The result reached in the foregoing case is an inevitable application of the principle of evidence and of logic that, as to matters which do not possess the quality of permanence and continuation, there is no presumption that conditions existing at one point in time are the same or similar to those existing at an earlier point in time. In other words, a presumption in such cases does not run backwards.

The court in *Gold v. United States* (C. C. A. 8), 36 Fed. (2d) 16, used the same reasoning in considering an appeal and reversing a judgment of conviction under the Mail Fraud Statute. The court said at page 33:

> "Evidence of various kinds was allowed to be introduced tending to show a drop in the price of the stock of the Southern Minnesota Bank from May, 1925, to the time of the trial in November, 1927; the purpose of the evidence being to establish that the prices in May and June, 1925, were fictitious and caused by the alleged fraudulent representations. The evidence was plainly inadmissible. Many factors might have intervened to affect the price unfavorably, and the uncontradicted evidence in the case showed the existence of a number of such unfavorable factors after the sales in May and June, 1925. The ruling in

the *Mandelbaum Case* on a similar point is controlling here."

In *State v. Mobley*, 241 Pac. 155 (Okla. 1925), a petition was filed to set aside a deed as having been executed for the purpose of defrauding creditors, and in the trial of the cause plaintiff attempted to prove that the grantor was insolvent and had no assets out of which the judgment could be collected. The court said at page 157:

"The plaintiff alleges E. C. Mobley is insolvent, and called E. C. Mobley as a witness to prove his insolvency at the time of the trial.

"Under the rule announced by this court, it is not sufficient to prove the insolvency of the grantor at the itme of trial or when suit is brought.

"In *Oklahoma National Bank v. Cobb*, 52 Okla. 654, 153 P. 134, this court said: 'In an action to set aside a deed charged to be fraudulent as to creditors, it must be both alleged and proved, before the deed can be set aside, that at the time the conveyance was made the debtor was insolvent, and the fact that the insolvency exists at the time suit is brought does not raise the presumption that the debtor was insolvent some months prior to that time'."

In *Brenan v. Eubank*, 56 S. W. (2d) 513 (Tex., 1933), suit was brought to set aside a deed to a bank and to cancel a contract and note given by the purchaser, upon the ground that the bank was insolvent. The court said at page 515:

"The burden of proof was upon appellant to

establish prima facie every element essential to his cause of action based upon fraud. * * * In at least one of these essential elements, the falsity of the representation as to the value of the stock, the evidence wholly fails. * * * Appellant asserts: 'It was a question of fact for the jury as to whether a bank, insolvent in June, 1930, could have been solvent with stock worth 100 cents to 135 cents on the dollar in February, 1929.' This, we think, is a non sequitur.

"Even in normal times there is no presumption that a bank which is closed by the department for some undisclosed reason was insolvent sixteen months prior to the time of closing.

"Independently of this we think we may take judicial notice of general economic conditions; that the stock market crash which heralded the present 'depression' occurred in October, 1929; that in its wake numerous banks and financial institutions all over the country, which had theretofore been not only abundantly solvent, but in a flourishing financial condition, failed; that this was especially true of the smaller banks (that in question was capitalized for $50,000).

"The record is entirely silent as to the bank's assets and liabilities at the time it was closed in June, 1930. Equally silent is the record as to why the bank was closed, whether from some irregularity committed by the directors, or that its then liquid assets were insufficient to meet the requirements of the banking laws."

Likewise, in the case at bar, the record is entirely silent as to the assets and liabilities of the corpora-

tion under consideration at the time of, and prior to, the date of the completion of the offense, April 9, 1930. Profit or loss from operations, of course, does not determine assets, liabilities or net worth. It will be seen from the balance sheet of September 30, 1930 (378) that the total *current* assets amounted to $426,012.03, while the total current liabilities were only $74,171.90. Null's computed deficit of $215,-378.47 was made possible, as has been said, only by giving to the common stock outstanding, *of no par value*, a liability aspect in the sum of $405,014.50. It was testified by Null that at the time the company went into receivership only $7,609.25 worth of claims were presented by the creditors and the total general accounts payable, and not all immediately payable, were less than $19,000 (389). No argument need be addressed to this court to the effect that the items of cash, accounts receivable and merchandise inventory in the asset column and the items of accounts payable in the liability column are subject to important and rapid changes over a period of six months.

In *California Credit & Collection Corporation v. Bernardini*, 246 Pac. 824 (Cal., 1926), action was begun against the defendant for the balance of the purchase price of corporate stock sold to him. Payment was resisted upon the ground that the execution of the note evidencing the indebtedness of the balance due upon the purchase was obtained through fraudulent representations. The defendants sought to introduce evidence of the value of the stock a year and a half subsequent to the date of the note. The court, in sustaining the action of the trial court holding such evidence inadmissible, said at page 825:

> "There was no evidence offered whatever to show the condition of the company's affairs or

> the value of said stock in the open market prior to or at the time of the making of such representations, or the actual value of said stock at any time. We are not prepared to say, therefore, that the evidence is legally sufficient to warrant this court in nullifying the finding of the trial court to the effect that appellant failed to prove the falseness of said representations."

In *Ellis v. State*, 119 N. W. 1110 (Wis., 1909), the defendant was convicted of receiving a deposit with knowledge that his bank was unsafe or insolvent. The trial court admitted evidence with reference to financial condition of debtor's bank, after the suspension and without proof that the same condition existed at the time of the occurrences charged in the indictment. In reversing the case the court said at page 1114:

> "It is an elementary principle of evidence that, as a general rule, presumptions do not run backward; that while 'when the existence of a person, a personal relation, or state of things is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question" *(State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500; Greenl. on Evidence, Sec 41), *there is no retroactive evidentiary inference, especially reaching backward materially.*"

Another application of the same principle appears in *Rardon v. Davis*, 52 S. W. (2d) 193 (Mo. 1932). This was an action for fraud in the sale or exchange

of bank stock and cash for the plaintiff's stock of general merchandise. Over objection the trial court allowed the plaintiff to show that on many of the notes very little or nothing could be collected at some unknown time after the exchange. The court said at page 195:

> "It is not sufficient proof of the insolvency of the notes at the time of and before the exchange was made, to show merely that they could not be collected at a subsequent time. *Akin v. Hull*, 222 Mo. App. 1022, 9 S. W. (2d) 688. The trial court should be careful to admit only competent testimony tending to show the value of the assets at the time of the exchange."

In *Davidter v. Ash*, 249 N. W. 886 (Mich., 1933), a verdict was directed against the plaintiff in an action for damages for fraud in the sale of securities. The entire opinion of the court is as follows:

> "The measure of damages in such case is the difference at time of sale in value of the securities as they were represented and as they were. On this matter plaintiff was put to proof and failed; the only evidence worthy of note being that some months later a receiver was appointed for the corporation issuing the securities. This was insufficient to support an assessment of damages, as the trial court correctly held."

There is abundant, additional precedent announcing the principle illustrated by the foregoing cases, but it is believed that a further presentation of the authorities is unnecessary in support of a doctrine which so comports with logic and common sense.

No matter with what care the authorities may be

investigated and exhausted, no case will be found, it is submitted, in which evidences such as the Null summaries was received, where the defendants were affirmatively shown to have had no connection with the underlying books and records, where all of the supporting data were not identified and not in court; where such books as were in court were themselves but summaries and not sufficient to enable the witness who prepared the exhibits to testify to their correctness; where even those books which were present in court were not identified at all for the first ten months' period of the corporate existence; where none of the books and records were offered in evidence; where but a few hours were accorded the defendants to test the sufficiency and the accuracy of the exhibits and to prepare for cross-examination; where the one witness, whose identification of the books of account was all-important, himself admitted the making of at least one substantial, fictitious entry, and where the defendant offered to show that such witness was a self-confessed manipulator and embezzler.

To confirm the action of the trial court in admitting these exhibits, under the circumstances at bar, would be, it is respectfully submitted, to remove the last vestige of protection to a defendant confronted with such testimony and would render obsolete and meaningless the requirement that the government must prove its case, in every important aspect of the offense, beyond a reasonable doubt.

III.

GOVERNMENT'S EXHIBITS 109 AND 110. BEING INCOMPLETE MEMORANDUM CARDS KEPT IN THE OFFICE OF THE COLLECTOR OF INTERNAL REVENUE FOR ARIZONA, PUR-

PORTING TO CONTAIN CERTAIN FIGURES OR SUMS COPIED FROM THE ORIGINAL RETURNS OF THE CORPORATION, WERE ERRONEOUSLY ADMITTED IN EVIDENCE (Specifications of Error 7, 8).

After Brandt had admitted the important, fictitious entries in the books of account and enough had been revealed to cast suspicion both upon him as a witness and upon the books themselves as exact and truthful records, and after the various witnesses had testified that the books and records underlying the so-called Null summaries were not even in court or identified—far less introduced—the prosecution succeeded in introducing in evidence Exhibits 109 and 110. These were informal cards kept in the office of the Collector of Internal Revenue for Arizona and containd certain bare and unsupported figures purporting to be the losses of the company from its operations during the years 1929 and 1930.

Upon Exhibit 109 appear two figures, one after the words "Gross Income"—$125,588.45, and after the words "Net Income" appears the following, "Loss $150,271.53." These totals appear under the column "1929." In the spaces for the name of the president and of the treasurer appear question marks (442).

Exhibit 110 is a similar memorandum card and in the line for the name and address of the taxpayer appears "United Sanders Stores, Inc. (formerly Ariz. Clarence Saunders Stores)," after the address, the date of organization appears as November 23, 1928, while on the previous exhibit, 109, the date of organization appears as October 25, 1928. The space for the name of the president is left blank and George J. Erhart is indicated as the receiver. Under the column

1930 appear the figures after the item "Gross Income," $306,054.21, and after the item "Net Income" appears "Loss, $135,626.67" (446).

A glance at the exhibits is enough to disclose their incomplete and unsupported character. The names of the officers are not disclosed; the figures from which the totals were calculated do not appear and the name of the party making the computation is not indicated.

The obvious purpose of these documents was to prove that the company had operated at a loss, contrary to the representations of the defendants, and that the corporation, by some representative, had stated such loss in its original income tax returns. If such statements by the corporation, or upon its behalf, were otherwise admissible, as it will be seen they are not, it is immediately apparent that the statements themselves are the best evidence thereof and this requires that the original returns be produced, if available, and, if not, that copies authenticated as required by law be offered in lieu of them. The originals were on file at Washington, D. C. (438), but no attempt was made to procure them or to procure authenticated copies which are expressly made available in cases in which the government is interested.

Section 1, Article 1091, Regulation 62 of the Treasury Department.

In a case decided by this court, *Gibson v. United States* (C. C. A. 9), 31 Fed. (2d) 19, it was held that a Deputy Collector of Internal Revenue is incompetent to waive any right relating to the examination of income tax returns. The court said at page 22:

"By a rule of the Treasury Department (Reg-

> ulations 69, Art. 1091; Treas. Dec. 2962; in re *Epstein* (D. C..) 300 F. 407; Id. (C. C. A.) 4 F. (2d) 529, it is provided that upon the written request of the Attorney General, or one of his assistants, an income tax return or a copy thereof may be furnished by the Commissioner to a United States attorney for use as evidence in any litigation in court, where the United States is interested in the result. Or, if the return is in the possession of a collector, it may, upon the conditions stated, be furnished by him."

It would seem to be self-evident not only that the original of a document is the best evidence of its own contents, but, also, that where such original is on file with some governmental custodian, a copy certified to, or authenticated by, such custodian would be the next best evidence of the contents of the instrument. Copies of the original income tax returns, duly authenticated, were readily available. As the court said in *In re Epstein* (C. C. A. 6) 4 Fed. (2d) 529, 530:

> "The question whether this certified copy of this income tax return can be introduced in evidence upon the examination of the bankrupt, is fully answered by Section 1 of Article 1091 of Regulation 62. That section provides among other things that the original return, or a copy thereof, may be furnished by the Commissioner of Internal Revenue to the United States attorney for use as evidence before the United States grand jury, or in litigation in any court where the United States is interested in the result * * *"

In *Lewis v. United States* (C. C. A. 9), 38 Fed. (2d) 406, the proper method of introducing evidence with reference to income tax returns is disclosed. The court said at page 413:

> "A certified copy of the income tax return to the United States Internal Revenue Department for the year ending March 31, 1924, was introduced in evidence. This return showed a loss of $378,000 for the year. Another return for the calendar year 1923, that is, the year ending January 1, 1924, signed by the appellant, Lewis, showing a loss of $396,000, was also received in evidence. These returns made to the government, purporting to show the condition of the company, were properly received in evidence, without other proof than the certificate of the governmental custodian thereof. 28 USCA Sec. 661, Rev. St. Sec. 882; *Lewy v. U. S.* (C. C. A.) 29 F. (2d) 462, 62 A. L. R. 388."

Mr. Roy M. Davidson, the acting collector under whose testimony these exhibits were introduced, first refused to testify under instructions from Washington. He returned the following day and announced that he had a telegram from Commissioner Helvering authorizing him *to testify.* The telegram was introduced in evidence without any foundation other than the statement that it had been received (437). It is to be noted that there is no consent or permission granted to Mr. Davidson in the telegram to disclose any government records, the authority being merely "to testify."

Thereupon, this witness stated that Exhibits 109 and 110 were cards kept in the regular order of business in connection with the returns of the company and, over objection, they were received in spite of the fact that Mr. Davidson conceded on his Voir Dire Examination *that he did not know anything about the entries upon the cards, nor whether they were true or correct, nor even whether they had been correctly*

copied from the returns (439). The sum-total of Mr. Davidson's testimony was that he knew that returns had been filed and that these cards were regularly kept and filed in his office. All of this is the exact equivalent of permitting Mr. Davidson to testify that some one whose name he did not know or whose connection with the company he did not know, had made a statement to some one in his office which he hadn't heard or seen, and that the employee had jotted down the memoranda which Mr. Davidson couldn't say were correct, in the routine of the business, which jottings are offered in evidence as competent and material proof that the company had suffered losses. It could only have been in utter desperation over the weakness of the foundation for the Null summaries and the disturbing thrust at Brandt that induced the prosecution to tender evidence of this nature.

Even if the corporation making the returns were a party to litigation, or if appellants had directed or sponsored the filing of the originals, these incomplete cards would be inadmissible.

In *Corliss v. United States* (C. C. A. 8), 7 Fed. (2d) 455, the court condemned the intrdouction of copies of income tax reports, some of which were identified by a former bookkeeper, and all of which, probably, had been sworn to by the defendants against whom the exhibits were offered. The defendants were indicted under Section 215 of the Penal Code, as in the instant case, and were charged with the making of false representations, one of the principal of which was to the effect that the company had paid, and would continue to pay, dividends. Having the burden of proving that such representations were false within the meaning of the Mail Fraud Statute, the Government introduced the testimony of

an expert accountant who stated that during the time the company had sold the stock and paid dividends it had been operated at a loss. To fortify the testimony of this accountant the copies of the income tax returns were introduced. Notwithstanding the existence of the other evidence in the record, the court promptly determined that the receipt in evidence of these copies, although only cumulative, was, in itself, flagrantly prejudicial error. The court said at page 457:

> "The most important evidence in support of the government's case consists of six exhibits purporting to be copies of income tax reports made by the company to the government. Three of these were identified by a former bookkeeper. The other three were wholly unidentified. These documents were received in evidence over properly framed objections by defendants. The papers were presented by the prosecution for the purpose of showing that defendants had made sworn statements to the government which demonstrated that the company's business was not prosperous but was conducted at an annual loss. The instruments on their face showed that they were copies. Before they could be received in evidence, the fundamental rule required the government to show that the original documents could not be produced. Greenleaf (15th Ed.) Sec. 82, 84; Stephens, arts. 64, 65. The very nature of the papers proved that such a showing could not have been made. The originals were in the custody of the Government, and, under the statute of Congress, were available whenever needed in court. Act Feb. 24, 1919 (40 Stats. at Large, 1086, Sec. 257 Comp. St. Ann. Supp. 1919, Sec. 6336 1/8x), and Regulation of Treasury

> Department, art. 1090. These copies are not signed. Witnesses were allowed to testify as to who signed some of the originals. A more flagrant violation of the best evidence rule could hardly be conceived. *This evidence goes to the very center of the government's case.* The rule requiring a document to be proved by its own production, and not by copy, and the rule which requires the production of the best evidence, both forbade the acceptance of these copies in evidence. For this error the case must be reversed."

The *Corliss* case, it is respectfully submitted, is completely determinative of this appeal.

In *Mohawk Condensed Milk Co. v. United States* (Court of Claims, 1930), 48 Fed. (2d) 682, the court refused to accept certified sheets containing totals and summaries of transactions which sheets the Comptroller General certified that he had received from the Federal Trade Commission. The court said at page 685:

> "There is no competent proof by the defendant to support the allegations of the counterclaims. The notices from the Comptroller General to the plaintiffs do not prove the correctness of the figures therein used. It appears that the Comptroller General's office obtained the figures shown in his notices from some one in the Federal Trade Commission, *but there is no competent proof as to who compiled these figures or how they were arrived at.* For the purpose of showing how the Comptroller General arrived at his figures the defendant offered in evidence certain sheets of paper containing certain totals and summaries which the Comptroller General

certified that he had received from the Federal Trade Commission. *No one who had anything to do with the preparation of these figures was called to testify as to their correctness or how they were arrived at.* The defendant claims that these documents represented an audit on the basis of the Federal Trade Commission cost accounting, as set forth in a pamphlet issued by the Federal Trade Commission, of July, 1917, entitled "Uniform Contracts for Cost Accounting, Definitions and Method." There is no competent proof of this. This court will not accept certified copies as proofs of facts as to the correctness of figures contained in documents certified by an official of the government who has received such documents from some other official, department, or commission. Certification of documents proves only the document itself, and permits its introduction in evidence without further proof of identification, *but such certification does not establish as a fact the correctness of the statements or figures therein contained.* When there is as here a controversy concerning the correctness of the contents of such documents, such contents must be proved by the party relying thereon the same as other facts. We cannot accept the sheets certified by the Comptroller General as proof of their contents or of the correctness of his determination."

In the opinion of the District Court in the *Epstein* case, *In re Epstein* (D. C. Michigan, 1934), 300 Fed. 407, which was affirmed by the Circuit Court of Appeals in the same case heretofore cited (4 Fed. (2d) 529), the court said at page 408:

"As testimony of the bankrupt concerning the

contents of the tax return would be incompetent (because secondary) evidence thereof in the absence of a proper foundation therefor, and as the return itself was available for introduction, and therefore no such foundation could be laid, the question essentially involved is whether the trustee in bankruptcy is entitled to introduce such income tax return in evidence without the consent of the bankrupt."

The returns themselves, or authenticated copies thereof, would be but computations made from other sources and were not, in any sense, even secondary evidence. Inasmuch as they were in no respect the act or deed of appellants, they could not be received upon the theory of an admission. If the persons signing such return and familiar with the contents were not actually made available for interrogation by a defendant against whom it is offered, he is rendered completely helpless and is placed at the mercy of the computations of a man whose name he does not even know.

A fortiori if such cards or memoranda are permitted in evidence against defendants facing grave charges with no opportunity to check the calculations, with no chance of looking at the original and deprived of the opportunity even of knowing the name of the person who made and signed the document, then all rules of evidence have no meaning and the burden of proof resting upon the Government is not merely lifted but is placed upon the shoulders of the defendant who, heretofore, has been said to be presumed innocent. Who can say that, in view of the baseless Null summaries and the tottering Brandt, the jury would have rendered the verdict it did if these exhibits, carrying the aura of governmental dignity, had been excluded?

It will probably be conceded that appellants had no knowledge of the returns or of their contents since there certainly was not a scintilla of evidence to that effect. Therefore, the returns themselves, had they been offered, would be but hearsay as to appellants. No authority need be cited to the effect that a statement made by a third party to a witness who is called cannot be testified to because it is hearsay.

The learned Judge, however, permitted these cards in evidence which contained figures copied from another document, as to which even the act of copying could not be vouched for as correct; such other document being made by a person unknown and, in turn, computed from books and records not introduced, offered, identified, present in court or described, nor even, so far as the record goes, known or ascertainable. This, assuredly, is hearsay thrice removed.

Attempt was made to qualify these exhibits as official public records carrying with them the import of verity, and in that connection the Government cited below, as it probably will upon this appeal, the case of *White v. United States*, 164 U. S. 100; 41 L. Ed. 365, in which the entries in a book kept by a jailer were held to be competent as a public record to show that the prisoner was in jail on a certain day. The witness stated that the book in question was kept by him as jailer, that the entries were made in his own handwriting and that he was required to keep such record. The defendant objected upon the ground that there was no law in Alabama requiring such a record to be kept and that it could only be used as a private memorandum to refresh the recollection of the witness. The objection was overruled and the witness permitted to read the entries from the book. The court said at page 103:

> "A jailer of a county jail is a public officer and the book kept by him was one kept by him in his capacity as such officer and because he was required so to do. Whether such duty was enjoined upon him by statute or by his superior officer in the performance of his official duty is not material. So long as he was discharging his public and official duty in keeping the book it was sufficient * * *. It is obvious that the nature of the office of the jailer requires not only the actual safe keeping of the prisoners, committed to his charge, but that in order to the proper discharge of its duties some list should be kept by him or under his supervision showing the names of those received and discharged together with the date of such reception and discharge."

Here was a physical fact directly observed by the jailer and recorded in his own handwriting. Such a record would probably be admissible if made by a clerk whose duty it was to keep such book but in that case, too, the entries would be based upon actual participation or observation. Such, obviously, is not the case at bar.

The Government relied, also, upon the case of *Heike v. United States*, 192 Fed. (C. C. A. 2) 83. In that case, however, the records were official registers or dock books of assistant United States weighers, the entries in which were made upon personal observation. The court said at page 94:

> "It is contended that there was error in admitting certain dock books of the assistant United States weighers. In these were recorded by such assistant weighers the results of their observa-

> tion of the scales made at the time of weighing. These were official records of the Government and produced from its files * * *."

The court said, further:

> "They are official registers or records kept by persons in public office in which they are required either by statute or by the nature of their office, to write down particular transactions occurring in the court of their public duties or under their personal observation."

The facts sought to be shown by exhibits 109 and 110 were ultimate facts, namely, losses suffered by the corporation. Such ultimate facts could only be observed by a Government employee through and by means of an actual examination of the events which resulted in such losses as reflected by regular, exact and complete entries appearing in the books of the corporation.

Cases such as *White v. United States* and *Heike v. United States* hold only, and properly, that public records are admissible when made by recognized and designated government agents, regularly recording facts observed or acts performed by them in the course of their duties and at the time of observation or performance. The jailer saw the prisoner and the weigher conducted the weighing process. The original returns from which the figures in Exhibits 109 and 110 were taken *were not made by the Government* but by the tax payer, a private citizen or corporation. While such returns may become part of the public files, they do not constitute a public record within the meaning of the rule. Were this not true, any document filed with a governmental agency would be admissible in evidence as proof of a fact no mat-

ter how inaccurate or even how tainted with perjury. The exhibits, as has been said, merely attempted to copy, incompletely, papers so filed without even the support of testimony claiming correctness.

The unknown signer of the original returns may have been the invisible witness who convicted these appellants.

IV.

APPELLANTS' CROSS-EXAMINATION OF TOM H. BRANDT WAS UNDULY RESTRICTED AND THEY WERE ERRONEOUSLY PREVENTED FROM DEMONSTRATING, BY THE INTRODUCTION OF EVIDENCE, THE INCREDIBILITY OF THE TESTIMONY OF THIS WITNESS WHOSE IDENTIFICATION OF BOOKS AND RECORDS, AND WHOSE TESTIMONY OTHERWISE, WAS ESSENTIAL TO THE GOVERNMENT'S CASE. (Specifications of Error 9, 10.)

It is entirely conceivable, nay, probable, that the verdict of guilty would not have been rendered had appellants been permitted to cross-examine Tom H. Brandt to a reasonable extent and to a natural conclusion. He was the witness upon whom the prosecution mainly relied in identifying corporate books of account, stock ledgers, minute books and signatures, in testifying to conversations respecting dividends and in other important aspects of the case. He was called and recalled by the Government six times during the trial and his testimony covers page after page of the transcript (Transcript of Record 251, 261, 267, 324, 391 and 411). Without Brandt there would have been practically no identification of the books of account and, accordingly, no foundation for the

Null summaries (Exhibits 89, 90 and 91) and, consequently, no proof (excepting as to the income tax cards) of the alleged falsity of the representations and no evidence of conversations respecting the dividends. He may be termed the one, indispensable, Government witness.

If it could have been demonstrated to the jury that he was a self-confessed embezzler of the funds of the very company he testified about, that he was guilty of a criminal breach of trust, that, by sly and underhanded methods he was dipping his fingers into the treasury *and had abstracted $5,000.00 within one month of his appointment as treasurer of the company,* is it possible that that degree of credence would be accorded to his bookkeeping entries as to enable the court to say that there exists that kind of a circumstantial guarantee of faithfulness to truth as would permit a conviction to stand based largely upon expert summaries taken from entries inscribed by the hand of such a manipulator? He was appointed treasurer of the company *on June 24, 1930* (248) and he had checked out $5,000.00 of the corporate funds, placed it in the account of the Phoenix Packing Company and had withdrawn $2500.00 of this amount for his own use *on July 1, 1930* (422).

Brandt became employed by the company about September 15, 1929, when he acted first as ledger man, and then became, what he termed, its comptroller, which position he held until August 7, 1930 (251). He then identified Government's Exhibits 34 to 39 for identification (books of account) saying that the entries therein were made by himself and other parties with whose handwriting he was familiar (252). He said: "Insofar as the entries in these books which I have identified are concerned, I would

say that they are true and correct insofar as my supervision extended" (253). It may be observed, in passing, that he testified that at that time the accounts which eventually blended into the general ledger were missing; that the pay-roll was missing; that the detail information accumulated through the journal and cash records were not present; that the accounts receivable ledger was not present and that the monthly trial balances which were taken were missing.

He testified, further, that "I cannot say that prior to September 15, 1929, the entries are true and correct as they were not made under my supervision, nor could I say that the entries made in the general ledger from early August, 1930, on, are true and correct" (255).

He testified as to the signatures of Mrs. Loveland, A. E. Sanders and Gus Greenbaum on a number of letters and documents which were later introduced in evidence (268). He identified commission checks and subscription ledger (324) and then proceeded to relate alleged conversations with Gus Greenbaum, one of the appellants, with respect to one of the most serious charges in the indictment, namely, the payment of dividends. In this connection his testimony and his conduct revealed by Government's Exhibits are sharply at variance.

Upon interrogation by counsel for the Government, he said that in December, 1929, he had a conversation with Mr. Sanders in the presence of Gus Greenbaum and that, although he couldn't remember the details of the talk the substance was that defendant, A. E. Sanders, told him to prepare dividend checks on the preferred stock. He testified that he told Sanders that the corporation had no earnings and

that they had nothing to pay the dividend from (329, 330); that he brought in a record showing the operating loss and "there was a discussion as to whether or not there was in fact a loss." Apparently appellant, Gus Greenbaum, took no part in this conversation, nor is it indicated that he was at that place in the office where he could hear what was said. Brandt testified "*I don't remember that Gus Greenbaum said anything at that conversation*" (330).

Then came some surprising testimony. Brandt stated that the company as of December 31, 1929, the same month of the alleged conversation, the company did have approximately $51,000.00 in cash on hand and he said that Government's Exhibit 40, a statement of financial condition of the company on December 31, 1929 *was prepared by him and that it was correct* (333). Thus the same witness who testified the company was not in position to pay dividends and had no funds with which to pay them, himself prepared Government's Exhibit 40 (335) which shows that on December 31, 1929, the company had on hand $51,326.72, in cash, more than twice enough to pay the dividend (380, 381); $70,974.05 of accounts receivable, inventories in the amount of $251,400.93 and investments and securities in the amount of $113,100.01. According to this statement by Brandt the total current liabilities were only $117,458.33 and there was a surplus of $33,780.46 with a total net worth of $884,190.46. The pretended statement of operating loss which the witness said he showed to Mr. Sanders was not introduced in evidence or accounted for, nor was it even described.

Brandt testified, also, that in June, 1930, he had a discussion with Gus Greenbaum while Mr. A. E.

Sanders was in Kansas, during which conversation this appellant is supposed to have said that the dividend for June must be paid. He said that he didn't recall any other conversation but that the dividends were paid and that Gus Greenbaum made a loan to the company of about $8,000.00 to assist in the payment. He said that at this time "we still didn't have any earnings and didn't have any money to pay these checks with" (330). Here again the Government Exhibits demonstrated an utter inconsistency between the words of the witness on the stand and his recorded acts. In Government's Exhibit 22 appear the minutes of a meeting of the board of directors held August 7, 1930, (248-250) at which were present A. E. Sanders, K. C. Van Atta and G. C. Partee. The financial statement of the company as of June 30, 1930, the dividend date, was presented by the president and shown to have been prepared by Mr. G. C. Partee, a witness for the Government, and approved by this same witness, Tom H. Brandt. This financial statement shows cash on hand and in bank in the sum of $45,334.37, with accounts receivable and merchandise inventories, at cost, making a total of $446,272.13. The statement shows, further, a surplus of $185,392.60. The correctness of this document is shown by the following certification which is appended to it (250):

> "I hereby certify that I have examined the books and records of United Clarence Saunders Stores, Inc., as of June 30, 1930; that the foregoing balance sheet is an agreement therewith, and that, in my opinion said balance sheet correctly reflects the financial position of the company as of that date."
>
> Signed: John W. Wagner,
> Certified Public Accountant.

In addition to these obvious inconsistencies, Brandt, after having testified that the books and records present in court were true and correct, proceeded to make the damaging admission that he had made an important, fictitious entry in the books of the company. He said that "Under the promise of A. E. Sanders in Kansas to get funds here, I made a fictitious entry and I showed it as a check to the Phoenix Packing Company for $5,000.00 and on the duplicate voucher I showed a charge against the Kansas Unit and put $4,400.00 in the Citizens Bank at Five Points, because on June 30th we had to make a return to the Corporation Commission on the sale of the stock and it required that the money be put up there" (418). Even this testimony as to the nature of the fictitious entry was a provable falsehood. On cross-examination he said "*I didn't cause that withdrawal to be made* from the Saunders Stores and the Packing Company account for a personal purpose of my own * * * I stated $4,400.00 out of the $5,000.00 went to the Citizens State Bank (416) * * * I didn't say that I had taken some of the Phoenix Packing Company money which I got from Saunders Stores and put it to my own account, and *I didn't do that*" (417). Counsel for appellants then had him identify his signature to Defendants' Exhibit E for identification and offered the same in evidence. This statement, consisting of eleven typewritten pages with reference to this shortage of $5,000.00, shows that Brandt drew a $2,000.00 check on the Phoenix Packing Company account payable to himself and another check of $500.00 and another of $100.00, also payable to himself, the $2,000.00 check being deposited in his personal account in the Commercial National Bank of Phoenix and the $500.00 check to his personal account in the Valley Bank at Phoenix. The

statement contains, also, the following questions and answers (419):

"Q. What is the extent of that shortage?

A. May I answer you in a different way? The extent of the shortage was $5,000.00 taken from the United Clarence Saunders Stores and deposited to the account of the Phoenix Packing Company and from which I have checked out $2,500.00.

Q. *To yourself?*

A. *Yes sir.*

Q. How did you get that $5,000.00 out of the United Clarence Saunders Stores into the Phoenix Packing Company, by what means?

A. We made our checks up in duplicate, and the original check showed payable to the Phoenix Packing Company $5,000.00. The duplicate showed United Clarence Saunders Stores, and the explanation was 'advanced to the Kansas unit'. That was charged into the United Clarence Saunders Stores account as organization and development expenses.

Q. In how many transactions or checks did you take this $5,000.00.

A. One.

* * * * * * * * *

Q. Then another check for traveling expenses appears on the 24th of July for $100.00?

A. No.

Q. *You took that upon yourself?*
A. *Yes.*

Q. Can you make this money good, Tom?

A. I think so, I couldn't possibly do it all at one time" (420).

The offer of this exhibit on the part of defendants was refused by the court.

In this position the witness, in trepidation over the matters with which he was being confronted, testified, further, that he left the company in the early part of August, 1930, but that he didn't remember the exact date. Then he said he did remember that the record would show it was August 7, 1930. He said, at one point, that he didn't have any particular reason for remembering the exact date and later that he might have had reasons for remembering that date (405). He said, too, that he was not accused of anything by Mr. Sanders on August 7, and later that he was accused of something on August 7 by somebody (407) and finally said that as a matter of fact, instead of resigning, he was discharged.

Brandt was not even accurate in his confession. *Four* checks were shown to him, each drawn upon the Phoenix Packing Company account in the Valley Bank, payable to his own order and by him endorsed, the first being dated July 1, 1930, in the sum of $500.00, the second being dated July 2, 1930, in the sum of $2,000.00, and two being dated July 24, 1930, one in the sum of $100.00 and the other in the sum of $500.00. The checks all bore his endorsement (422, 423). These checks were offered in evidence and, after objection and considerable argument, the objection was sustained, the court limiting the cross-examination and preventing the complete demonstration of the character of the witness as to his veracity

and his general unworthiness to be entitled to belief. In restricting the effort of appellants to pursue the inquiry, the court said: "This witness has testified that one of the entries in that book is fictitious. *It strikes me that this satisfies your inquiry.* Make your avowal" (425).

Thereupon counsel for appellants avowed (425) that if permitted to ask the questions Brandt would testify that he had stated before witnesses that he was personally responsible for said shortage of $5,000.00, that he had embezzled the same and that $2500.00 thereof had actually been checked out to his own personal use; that said embezzlement was effectuated by duplicate checks and manipulation of corporate funds; that many of the books and records of the company were kept by the witness in his own home and not at the company office for the purpose of concealing his transactions, which books were not present in court; that he had taken the money from the company funds about the 26th or 27th of June, 1930, and that the withdrawal was charged against the Kansas Unit to organization and development expense. The court promptly sustained the objection to the avowal.

The inability of the trial court to see the importance to the defense of a reasonable opportunity to show additional false entries, to show how and where important books were kept and to show that they were kept by, or under the supervision of, a man guilty of a criminal breach of trust directly affecting both his testimony and the books and records which he had stated to be correct, is difficult to comprehend, especially in view of the fact that appellants had been subjected during the trial to the repeated,

evasive, contradictory, untruthful onslaughts of this witness.

The cross-examination of a witness is a matter of absolute right, one of its purposes being to bring out facts tending to discredit him by showing that his testimony in chief was untrue or biased. It is of the essence of a fair trial that reasonable latitude to that end be given to the cross-examiner, and the credibility of the witness thus put to test. The denial of this right is prejudicial and fatal error.

In one of the leading cases in the United States courts, upon the subject of cross-examination, *Alford v. United States*, 282 U. S. 687; 75 L. Ed. 624, the Supreme Court reserved a judgment of the Circuit Court of Appeals affirming a conviction for violation of the Mail Fraud Statute *(Alford v. United States*, (C. C. A. 9), 41 Fed. (2) 157). In its opinion the Court of Appeals had said, "the purpose of such evidence is to identify the witness and to some extent give proper background for the interpretation of his testimony. In this case, however, the counsel indicated his purpose to use the information for the purpose of discrediting the witness. It is part of the obligation of a trial judge to protect witnesses against evidence tending to discredit the witnesses unless such evidence is reasonably called for by exigencies of the case * * *. Here it was evident that the counsel for appellant desired to discredit the witness, without so far as is shown, in any way connecting the expected answer with a matter on trial." In reversing the judgment of the Circuit Court of Appeals, the Supreme Court, speaking through Mr. Justice Stone, said at page 691:

"Cross-examination of a witness is a matter

of right. The Ottawa, 3 Wall. 268, 271, 18 L. Ed. 165, 167. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood (cf. Khan v. Zemansky, 59 Cal. App. 324, 210 Pac. 529; 3 Wigmore, Ev. 2d ed. sec. 1368, I. (1) (b); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment; * * * *and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased,* (Tla-Koo-Yel-Lee v. United States, 167, U. S. 274, 42 L. ed. 166, 17 S. Ct. 855; King v. United States, 50 C. C. A. 647, 112 Fed. 988; Farkas v. United States (C. C. A. 6th) 2 F. (2d) 644; see Furlong v. United States (C. C. A. 8th) 10 F. (2d) 492, 494.

Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. Knapp v. Wing, 72 Vt. 334, 340, 47 Atl. 1074; Martin v. Elden, 32 Ohio St. 282, 289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * * To say that prejudice can be established only by showing

> that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

It is to be particularly noted that the Supreme Court establishes not only the right of cross-examination of a witness for the purpose of impugning his reputation for veracity in his own neighborhood, but clearly adds that another purpose is that facts may be brought out tending to discredit the witness by showing that his testimony was untrue or biased. The language of the court is in the conjunctive.

In a subsequent case, *Cossack v. United States*, (C. C. A. 9) 63 Fed. (2d) 511, this court closely followed Mr. Justice Stone's opinion. In addition to quoting at length from the opinion, this court made the following pertinent observation:

> "We cannot say that the jury would have convicted the appellant had it disbelieved Mrs. Totten's testimony."

In *Heard v. United States* (C. C. A. 8), 255 Fed. 829, the court said at page 832:

> "The cross-examiner has the right to prove by his adversary's witness, if he can, what inconsistent statements he has made, not in general, but in every material detail, for, the more specific and substantial the contradictory statements were, the less credible is the testimony of the witness.
>
> It is no answer to a refusal to permit a full cross-examination that the party against whom the witness is called might have made him his own witness, and might then have proved by

him or by some other witness, or by some writing, the facts which the cross-examiner was entitled to draw from the testimony of his adversary's witness. No one is bound to make his adversary's witness his own to prove facts which he is lawfully entitled to establish by the cross-examination of that witness. The testimony given by a witness on his cross-examination is the evidence of the party in whose behalf he is called and the cross-examiner has the right to bind his adversary by the truth elicited from his own witness."

By permitting counsel for appellants to go only as far as they did in Brandt's cross-examination and by the unyielding attitude of the Trial Judge, in his protection of this witness, it is more likely than not that, with the questions left asked and unanswered, the jury, in their lay conception of such matters, drew conclusions adverse to appellants. It might have been more advantageous to the defense had the court stopped the inquiry *in liminae* and had not permitted appellants to proceed to the point of denouement and then, at the crisis, shut off the examination. The trial court's action in this regard ran counter to the liberal rule pronounced by the Supreme Court.

V.

THE GOVERNMENT FAILED TO PROVE BY ANY COMPETENT EVIDENCE WHATSOEVER CERTAIN MATERIAL ALLEGATIONS OF THE INDICTMENT, AND FOR THIS ADDITIONAL REASON, ERRED IN OVERRULING APPELLANTS' MOTIONS FOR DIRECTED VERDICT. (Specifications of Error 2, 3, 14.)

All of the points hereinbefore urged, and in fact,

hereinafter to be discussed, were raised by timely objection and exception to the court's rulings and by the formal motion to strike each of the Government's exhibits and the testimony with reference thereto and to instruct the jury to disregard them (449). They were raised, also, by appellants' motions for directed verdict at the close of the Government's case and renewed at the close of all the evidence (449).

Fearing to place a further burden upon the time of the court, by separate treatment, appellants will group under this one division of the argument a series of grounds which seem to adjust themselves to discussion under one head, in support of the contention that the court erred in failing to direct a verdict of not guilty.

It can hardly be the subject of dispute that, as to certain material allegations of the indictment, the Government offered no proof whatsoever. In some instances the proof directly contradicted the allegations, and in some the evidence constituted a material variance from the indictment.

In the first place there was no identification of the signature of "M. Loveland" to Government's Exhibit 43, the mailing of which is pleaded in the indictment as the offense charged (13). During the trial the Government showed to the witness, Brandt, a batch of letters fastened together, which were referred to as Government's Exhibit 41 for identification which, under the court's instructions, were marked 41-a, 41-b, etc. (270). For identification purposes, the letter of April 9, 1930, was marked "Government's Exhibit 41-U for identification," following a series of letters of earlier dates. Brandt, who identified the

signatures to this batch of exhibits, failed to include Exhibit 41-U for identification, which was, nevertheless, received in evidence as Government's Exhibit 43 over the specific objection of appellants that it did not connect or tend to connect appellants or any of them with the offense charged; that appellants were not a party either to the mailing of the letter or to the letter which elicited that response; that it was incompetent, irrelevant and immaterial, so far as appellants were concerned, and that there was no adequate proof of mailing. This piece of evidence, vital to the offense,—indeed constituting the gravamen of the charge,—was not lawfully received.

It goes without saying that if there is no evidence, direct or circumstantial, that the appellants mailed, or caused to be mailed, the letter to Addie Driscoll (Government's Exhibit 43), then no offense has been proven. The court in its instructions said: "Without proof of the mailing of the letter of April 9, 1930, to Mrs. Driscoll, there could be no conviction in this case" (481). True, the postmark is prima facia evidence that the envelope had been mailed, but that does not answer the question as to who mailed the letter or caused it to be mailed. The point here involved has been directly passed upon in several cases. We will cite but one: *Freeman, et al. v. United States* (C. C. A. 3), 20 Fed. (2d) 748, 750.

As stated, Government's Exhibit 43 was originally Government's Exhibit 41-U for identification, and was part of a batch of letters originally marked Government's Exhibit 41 for Identification. The evidence wholly fails to establish the identification of the signature "M. Loveland" on this letter and, therefore, the court should have either sustained the objection to the introduction of the letter (273) or should

have stricken it upon motion (449), or should have granted appellants' motion for a directed verdict on that ground (Transcript 454, sub-division 18 of Motion for Directed Verdict). In omitting to identify the signature of "M. Loveland" on this letter, the Government failed to establish that the appellants mailed, or caused to be mailed, said letter. This is fatal, and under no theory can be termed "harmless error."

In many of the important events touching the organization and capitalization of the company, averred in the indictment as having been the result of the acts of all the defendants, including appellants, there was no proof whatsoever of appellants' participation. Thus, while it is alleged that the defendants organized and incorporated the company with a certain capitalization for the purpose of engaging in merchandising, (3) the Government's own proof denies the allegation. The defendant, A. E. Sanders, testified "I organized the Clarence Saunders Stores, Inc." (345). After testifying that something had been said by one of the appellants, which one he did not recall, about preorganization stock, Mr. Sanders said that his attorney, Mr. Bird, told them that if they wanted to do business that way they "would have to get some other attorney, that he was representing me and not them" (346). Mr. Sanders positively stated, moreover, that the "Company was organized in Nogales by me. Mr. Duane Bird prepared the papers" (346). Again, Mr. Sanders said, "I applied for the issuance of 151,000 shares of the common stock to me through my counsel, Mr. Bird. He was not counsel for the Greenbaums. Prior to meeting the Greenbaums I was in business and desired to extend it."

While the indictment charges that appellants par-

ticipated in the acquisition of the Saunders franchise agreement and in causing the issuance of 151,000 shares of the common stock of the company to A. E. Sanders in consideration thereof, and for the transfer of a certain option to purchase stores known as the Cashway Stores, the evidence, as has been seen, refuted the charge (349). In this connection Mr. Sanders' conflicting statements to the effect that appellant, Will Greenbaum, discussed the matter of the Saunders franchise with him, went to Memphis with him, saw Clarence Saunders with him and obtained the franchise, after which they returned to Arizona and organized the company was destroyed on cross-examination by his statement that *he did not remember whether or not appellant, Will Greenbaum, did go with him to Memphis.* Therefore his positive statement on direct examination which included four elements (1), the preliminary conversation (2), the trip to Memphis (3), the conference with Saunders and (4) the return to Arizona and the organization of the company, all a one-piece narative, was destroyed when he took back three out of the four elements of his testimony, namely the trip to Memphis, the conference with Saunders and the return to Arizona (352).

The indictment avers that it was a part of the alleged scheme that the defendants, including appellants, should issue to A. E. Sanders for the sum of $1.00 35,000 shares of the common stock, three-fifths of which the defendants, meaning all of them, sold to the persons to be defrauded for the benefit of all the defendants (5). Not only did the Government fail to prove this allegation, it was firmly denied by its own witness, A. E. Sanders, who testified that the 35,000 shares of common stock mentioned in the indictment were issued to him but were turned back

to the company intact and that none of the shares were given to the Greenbaums and that they never had anything to do with it whatsoever (356).

The indictment alleges that the defendants, including the five named, acted under the name Greenbaum Brothers and the Bond and Mortgage Corporation in selling and offering to sell the common and preferred stock and debenture bonds of the company by means of false pretenses (5). The evidence disclosed, however, that A. E. Sanders had no connection, direct or indirect, with the sale of the stock and that there was an outright contract under which appellants operated at an agreed and allowed commission, in which he did not participate (349, 350).

As to H. D. Sanders, it will not be disputed that he had nothing to do with the organization of the company or with the operations of appellants and did not join the enterprise until long after April 9, 1930, the date of the alleged commission of the offense. A. E. Sanders testified that appellants had nothing to do with the Piggly-Wiggly Holding Corporation or the U-Save Holding Corporation or any connection whatsoever with them, these companies having been organized by his brother, H. D. Sanders (350). He said, further, that the H. D. Sanders' appearance in the enterprise dated from the contract between United Sanders Stores, Inc., and the U-Save Holding Corporation (351), which was in November of 1930 (351, 352). Furthermore, Mr. Sanders testified that "The Bond and Mortgage Corporation stopped, as far as I know, selling or offering for sale, any of the capital stock or debentures owned by the company along in June or July 1930" (355). And, further, he said, "I don't think that the Bond and Mortgage Corporation and the Greenbaums had anything to do with the sale of any stock of the company

after the name was changed to United Sanders Stores, Inc." (357, 358). This change in name occurred November 1, 1930 (221).

The indictment alleges that it was further a part of said scheme that the defendants should and they did authorize and pay a semi-annual dividend of 8% on the preferred stock of the company, on June 29, 1929 (5). There was no evidence whatsoever of the payment of any dividend on that date or at any time approximating it. A dividend was paid as of June 30, 1930, a year later, but of this the defendants were not charged and it constitutes, of course, a distinct variance between the pleading and the proof.

As to those portions of the indictment respecting the organization or operations of the Piggly-Wiggly Holding Corporation, the name of which was changed to U-Save Holding Corporation, by the defendant, H. D. Sanders, and his associates, and respecting the acquisition of control by the U-Save Holding Corporation of the common stock of the company under consideration, and the removal of $100,000.00 of merchandise from Arizona to California (Transcript of Record 6, second and third paragraphs), there was not only a complete absence of proof as to participation in these events by appellants, there was direct and uncontradicted evidence to the contrary. With the advent of H. D. Sanders, appellants and A. E. Sanders came to a parting of the ways.

The record is utterly silent as to whether or not appellants and H. D. Sanders were even acquainted or had ever met. H. D. Sanders had his own ideas. His was the plan to consolidate the corporation in question with his company, with which appellants

had no connection, and according to the Government's evidence he announced to the stockholders of the company the men who would be his associates—and they did not include appellants, nor has there been, nor will there be, any claim by the Government that the lives, or the intent, or the activities of appellants and H. D. Sanders touched at any point. Mr. G. C. Partee, one of the Government witnesses, so notified the stockholders on October 6, 1930 (281).

There is, and there can be, no room for doubt, therefore, that if the acts of the defendant, H. D. Sanders alone or with his associates, were unlawful and constituted an illegal scheme in the furtherance of which the United States mails were used, such conduct is not chargeable against appellants. Consequently, since there was no proof of any act or intent of theirs with reference to these transactions, the admission of evidence that such transactions occurred as the result of activities of others, when appellants alone stood trial under an indictment charging them with participation must, inescapably, constitute grave and prejudicial error.

In connection with the events, which for the purpose of convenience have been termed the "H. D. Sanders Events," many letters and announcements were received in evidence, over objection, read to the jury and considered by them in determining the guilt or innocence of appellants when, in fact, there was not a scintilla of evidence tending, even remotely, to connect appellants with them. This is true of a form letter dated July 21, 1930, signed by K. C. Van Atta, a Government witness, advising stockholders that "our volume of business is beyond any figure that we had anticipated with each month showing a substantial increase." (Exhibit 52, Transcript of Record 279.)

It is, also, true of Exhibit 53 (280), a mimeographed letter to stockholders signed by A. E. Sanders calling their attention to a stockholders' meeting to be held November 1, 1930, and indicating the cancellation of the agreement to pay Clarence Saunders one-half of one per cent. on the gross volume of business, which percentage "amounts to about $10,000.00 a year," thus indicating a gross volume of business of two million dollars annually.

The notice to stockholders, dated October 6, 1930, Government's Exhibit 54 (281), has already been refered to as announcing the plan to consolidate with H. D. Sanders Company, giving glowing pictures of H. D. Sanders and his associates—among whom is named the defendant, A. E. Sanders—and in which the payment of interest and principal on debentures and dividends on preferred stock is guaranteed. As to this exhibit there is no claim that appellants bear any responsibility.

The same considerations are applicable to Government's Exhibit 56 (289), a letter dated January 15, 1931, signed by H. D. Sanders, announcing the purchase or control of the corporation by the U-Save Holding Corporation and as to Government's Exhibit 64 (297), a form letter dated January 10, 1931, signed by Mr. G. C. Partee on behalf of United Saunders Stores, attached to which was a statement by a certified public accountant as of December 31, 1930, showing a net worth of $939,944.06 (299).

Such exhibits as the articles of incorporation of the Piggly Wiggly Holding Corporation of Yuma (212), or the certificate of amendment to its charter (213), the articles of incorporation of the Piggly Wiggly Southwestern Company (214), the letter

being dated July 9, 1927, long antedating the incorporation of the company under discussion, and the annual report of the U-Save Holding Corporation (219), as to which there is no pretense of connection with appellants, are so obviously inadmissible as to them that further comment with respect thereto is unnecessary.

No proof was offered as to the financial condition of the company at or prior to the date of the alleged commission of the offense, April 9, 1930, in support of the allegations of the indictment as to alleged fraudulent statements of financial condition. This point has been discused in full in a previous portion of this argument.

The indictment alleges that after the acquisition of control of the company by H. D. Sanders or the U-Save Holding Corporation, merchandise valued at more than $100,000.00 was removed from Arizona to Los Angeles (6). There was no proof whatsoever as to the removal of such merchandise as against any defendant but its influence upon the grand jury in returning the indictment cannot be computed nor, indeed, is it possible to tell that the jury before whom the case was tried, after listening for about one month to the reading of the indictment, to the introduction of one hundred ten exhibits, to the testimony of the witnesses and to the discussions of counsel, were able to remember whether the removal of the $100,000.00 of merchandise was merely averred in the indictment or proved as a fact.

To conclude this section of the argument, mention should be made of the fact that the indictment charges that the letter to Mrs. Driscoll, dated April 9, 1930 (Exhibit 43), the mailing of which is alleged

as constituting the gist of the offense, was mailed for the purpose and with the intent of executing the scheme to defraud, while the evidence shows that at the time said letter was mailed Mrs. Driscoll had already acquired her shares of stock and made no purchases thereafter. She testified "I bought no more stock after April 9, 1930, nor did I make any further payments on stock that I had already bought after I received the letter dated April 9, 1930." (293). Certainly the proof of the events after the mailing of the letter of April 9, 1930, which were charged as constituting a part of the scheme to defraud, in furtherance of which the letter was mailed, were inadmissible even upon the theory of proving intent. It cannot sensibly be conceived that the defendants devised a scheme to defraud in November of 1928, the date of the organization of the corporation, and contemplated at any time, although H. D. Sanders was not one of the 'designers', that he should, years later, acquire control and dispossess the company of its assets. Assuredly, also, the letter of April 9, 1930, cannot by any elastic stretch of imagination be regarded as having been mailed in furtherance of any such scheme.

VI.

THE GOVERNMENT ATTEMPTED, BY THE INTRODUCTION OF EVIDENCE, TO PROVE TWO DISTINCT SCHEMES TO DEFRAUD, IN ONE OF WHICH, IT WAS AFFIRMATIVELY SHOWN, APPELLANTS HAD NO CONNECTION WHATSOEVER. PROOF OF TWO OR MORE SCHEMES ALLEGED AS ILLEGAL ENTERPRISES IS NOT PERMISSIBLE UNDER ONE COUNT OF AN INDICTMENT. (Specifications of Error 3, 11, 12, 13, 15, 16, 17, 18.)

Considering the proof with careful reference to the indictment, it will be seen that if the first count under which appelants were convicted be taken, by some stretch of reason, *to plead* only one scheme to defraud, the Government, probably unconsciously adhering to its original conception of the case in seventeen counts, proceed, nevertheless, to introduce in evidence *proof of two unrelated adventures,* thus, as has been said, electing to adhere to the paragraphs relating to H. D. Sanders and to his U-Save Holding Corporation enterprise, and, by that same token, removing the possibility of regarding the paragraphs appertaining thereto as harmless surplusage. Even if this evidence did not attempt to prove two distinct schemes, it is just as fatally erroneous as if it did, because such evidence, assuredly, constituted proof of transactions adversely affecting the corporation and, especially since there was no showing of participation by appellants, it was obviously prejudicial to them in their defense.

Enough has been said heretofore with reference to H. D. Sanders, the U-Save Holding Corporation the acquisition of control of the corporation under consideration and the removal of the merchandise to apprise the court of the time and nature of these events. Suffice it to say here that there was nothing in the evidence or any intendment therefrom which connected appellants with H. D. Sanders, or which involved them directly or indirectly with the incidents which followed his appearance in the history of the case.

While there are some cases which hold that defendants charged with a criminal conspiracy need not, in order to make them liable, each take part in every phase of the venture, and that it is unneces-

sary, to render them culpable, that each has knowledge of the activities of the others. It has been said, too, that one defendant may later join forces with the project and thus become part of it and hence criminally responsible. But there is no such situation presented by the instant case. No conspiracy is charged.

From the very nature of the allegations of the indictment and the proof offered in support thereof, it is apparent that there can be no logical or possible common design in a scheme to obtain money from persons to be defrauded in inducing them to purchase stock by false pretenses and in a plan to obtain control of the corporation after it has been organized and has acquired assets and business and to remove those assets from the state and to induce stockholders who have been already persuaded to purchase, to surrender their shares in exchange for capital stock in a new corporation formed of a combination of four companies, as to three of which certain of the defendants had no knowledge or connection. The two ventures are unalterably inconsistent and it would be to ignore and evade the facts, to conclude by some legalistic sophistry, that all of the transactions charged in the indictment and all of the events attempted to be proved moved to a common, unlawful end.

Whether acting together or not, and with or without knowledge on the part of each person charged of the parts played by all of the defendants, or whether or not different means are used by different defendants, their acts and their intent must "ever lead to the same unlawful result." That cannot be said of the case at bar.

As this court said in *Terry v. United States*, (C.C. A. 9) 7 Fed. (2d) 28, 30:

> " 'If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment.' United States v. M'Connell (D.C.) 285 F. 164.
>
> "In other words, a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of lifetime. For these reasons the rulings complained of are erroneous and call for a reversal. Proof that the plaintiff in error was guilty of another crime was in itself prejudicial, and an instruction that he might be convicted of a crime not charged in the indictment cannot be sustained."

Undoubtedly in the case at bar there was no privity, under the evidence, between appellants and H. D. Sanders and his associates, nor did these parties act toward the same common end, but toward separate ends not even similar in character.

The Supreme Court of the United States, in speaking of consolidation of indictments, said in *McElroy v. United States*, 164 U. S. 76; 41 L. Ed. 355:

> "And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorized the joinder of distinct

felonies not provable by the same evidence and in no sense resulting from the same series of acts."

In *De Luca v. United States* (C.C.A. 2), 299 Fed. 741, the court, in reversing a judgment of conviction under an indictment charging the unlawful removal to evade duty on twenty cases of opium, which was consolidated with another indictment charging the sale of opium in a package not originally stamped, said at page 745:

> "Where different acts are provable by the same evidence, so that it is not possible to separate the proof of one from the proof of the other, they may be said to be connected. But there must be such connection in respect of time, place and occasion that it would be difficult, it not impossible, to separate the proofs of one charge from the proofs of the other. Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208. * * * This over act of sale, as alleged and as pleaded in the indictment, was not in furtherance of the conspiracy to defraud the customs duties. Furthermore, it appears from the record that the sale of 102 pounds of opium was wholly distinct and apart from the conspiracy. The 102 pounds which were sold as proven did not come from the 20 cases. We are satisfied that the two crimes were wholly distinct from each other. They were conceived and perpetrated at different times. While both groups of the defendants might be said to have a similar general purpose in view of trafficking unlawfully in narcotics, this does not justify the consolidation of the charges into one bill and a trial thereof at one time."

In *Tinsley v. United States*, (C.C.A. 8) 43 Fed. (2d) 890, the court, in speaking of the evidence introduced under an indictment charging larcency of horses and a conspiracy to commite larceny, said at page 893:

> "The law is well settled as to the introduction of evidence of other offenses in the trial of a criminal case, and this court has many times expressed itself thereon. If no question of a defendant's intent is involved, unless there is some connection between such offenses and those charged, it is manifestly unfair and unjust that evidence of life offenses to those charged in the indictment should be introduced. In Cook v. United States, 14 F. (2d) 833, 834, this court said: 'Evidence may not be admitted of other alleged crimes not related to the offense under trial, except where intent is an essential ingredient, or the subject of inquiry is so related to the main offense as to throw material light thereon'."

The evidence as to H. D. Sanders events can, of course, have no bearing upon the intent of appellants if, in fact, there was no connection between the parties and, as the evidence disclosed in the case at bar, no common design. To say that such evidence would be thus admissible, under the circumstances, would be to beg the question.

In *Coco v. United States* (C.C.A. 8), 289 Fed. 33, the court, in quoting with approval from McGehee v. State, 58 Ala. 360, said:

> "' * * * If two offenders be charged in one indictment, which is faultless in form, and it be developed in the evidence that the two defendants

committed their several offenses at different times or places—in other words, that they are not guilty of one and the same offense—the proof does not sustain the indictment. * * * In the present case, according to the recitals in the bill of exceptions, each defendant was equally guilty, but they did not participate in one and the same offense. This was not shown until the evidence was given to the jury. At that stage of the trial, each defendant was placed in legal jeopardy, and was entitled to have a verdict of the jury on the question of his guilt, in the absence of some statutory or legal ground, authorizing a nolle prosequi, or other withdrawal from the jury, that another indictment might be preferred, or continuance granted. * * * The defendants, having been placed in jeopardy, and being entitled to a verdict of acquittal on the proof made, * * * cannot be again tried for the same offense.' "

Even as to a conspiracy, the court in *Wyatt v. United States* (C.C.A. 3), 23 Fed. (2d) 791, said at page 792:

"Having a responsibility for the enforcement in this circuit, not only of the National Prohibition Law, but of federal laws generally, we are strongly of opinion that the conspiracy statute should not be stretched to cover and be misused to convict for offenses not within its terms, and that, when resorted to, the conspiracy alleged must be proved as charged. When, as here, one large conspiracy is specifically charged proof of different and disconnected smaller ones will not sustain conviction; nor will proof of crime committed by one or more of the defendants,

wholly apart from and without relation to others conspiring to do the thing forbidden, sustain conviction. Terry v. United States (C.C.A.) 7 F. (2d) 28, 30; United States v. McConnell (D.C.) 285 F. 164, 166."

In *Marcante v. United States* (C.C.A. 10), 49 Fed. (2d) 156, the court expressly approves and quotes from the opinion of this court in *Terry v. United States*, 7 Fed. (2d) 28. The court, after stating that a conspiracy is bottomed on an agreement to accomplish an illegal act, said at page 157:

"On the other hand, there may be two or more conspiracies in the same state to violate the same law. If such be the case the government may not convict all the members of all the conspiracies under a charge of membership in one large conspiracy. To do so is to ignore the facts."

In *United States v. Siebrecht* (C.C.A. 2), 59 Fed. (2d) 976, the defendants were indicted for conspiring to misapply funds of the bank. The court said at page 977, in speaking of a first and second purchase by one of the defendants as overt acts in furtherance of the conspiracy:

"It is nothing but guesswork to say that the second purchase was contemplated when the first was undertaken or that the two transactions were part of a general plan."

At page 978 the court said:

"The second scheme was not designed until three weeks after the first had actually ended. The first, if a separate conspiracy, was barred by the three-year statute of limitations when the

indictment was found on November 13, 1930. This is true whether it ended on October 18 or November 11, 1927. Its expiring life could not be revived by the breath of a new and different conspiracy entered into (even if we fix the origin of the first conspiracy as late as October 1) some five or six weeks later.

"Thus we have proof of two conspiracies under an indictment alleging a single one, and a conviction for both when the first was barred by the statute of limitations.

"There was, we are persuaded, a failure of proof of the single conspiracy alleged, *which amounted to a fatal variance.* Tinsley v. United States (C.C.A.) 43 F. (2d) 890; United States v. Wills (C.C.A.) 36 F. (2d) 855; Meyers v. United States (C.C.A.) 36 F. (2d) 859; Wyatt v. United States (C.C.A.) 23 F. (2d) 791; Terry v. United States (C.C.A.) 7 F. (2d) 28."

To the same effect, see:

Beaux Arts Dresses v. United States (C.C.A. 2), 9 Fed. (2d) 531, 533.

Nazzaro v. United States (C.C.A. 10), 56 Fed. (2d) 1026, 1028.

From an analysis of the foregoing cases and many others, which could be cited to the same effect, it is clear that even if the indictment be regarded as pleading the equivalent of a conspiracy, and even if it charged but a single scheme to defraud, proof of the transactions and events occurring after H. D. Sanders appeared upon the scene constitutes a fatal variance.

VII.

INSTEAD OF PROVING THE OFFENSE AS LAID IN THE INDICTMENT, BEYOND A REASONABLE DOUBT, THE EVIDENCE AFFIRMATIVELY DISCLOSED THAT THERE WAS NO COMBINATION IN UNLAWFUL INTENT OR ACTIVITY ON THE PART OF THE DEFENDANTS. (Specification of Error 3.)

The plan of the case as pleaded in the indictment would never be recognized by its evidentiary structure when completed. The very keystone of the charges—the origination of the enterprise and its continuation with a jointly evil intent was denied by the Government's own witness, A. E. Sanders, whom the prosecution vouched for when it placed him on the stand.

While the intent of the parties may be gathered from their acts, nevertheless, when the Government places a man upon the witness stand who gives direct testimony as to intent, as he may when intent is a serious issue, such testimony should be heeded. And, when additional facts testified to by him and other witnesses are clearly consistent with innocent motives, his direct testimony as to the intent and purpose of the parties is, to that degree, strengthened.

In this connection the examination of Mr. Sanders was as follows (354):

> Q. "Mr. Sanders, was there ever a word between you and the Greenbaums, or any of them, that you and they or any of them would commit a fraud upon the public or any member of the public?"
>
> A. "There was not."

> Q. "Can you recall any conversation at any time or place between yourself and the Greenbaums, or any of them, where any unlawful act was contemplated?"
>
> A. "There never was as far as I know."

At another point in his testimony he said, in part (349):

> "I do remember I said that as far as I was concerned there was no intent on my part, or on the part of anybody that was connected with me, to defraud the public, that I was sold 1000% on the Clarence Saunders Stores. I thought the business was going to be successful, and as far as I knew the Greenbaums thought so too."

It would be hardly fair for the Government to suggest that Sanders be believed as to so much of his testimony as tends to support its position and disregarded as to that which is unfavorable. And it would seem too high a price to pay for his testimony now to urge, contrary to the avowed theory of the indictment, that only appellants, and not he, were motivated by an unlawful intent.

As the result of appellants' efforts between $800,000.00 and $900,000.00 actually went into the treasury of the corporation as fresh capital (349). The chain store plan of business seemed to be demonstrably sound. So far as the commission of 20% paid to appellants is concerned, it was expressly allowed by the Corporation Commission (222, 229, 234, 235). There was nothing inherently wrong with the delivery to appellants by Sanders of shares of his personally owned stock of which he had, also by express permission of the Corporation Commission,

151,000 shares which were not required to be escrowed (241) and the sale of which was not restricted (222). Contrary to the contentions of the District Attorney, these shares were not, immediately upon acquisition by Sanders, transferred to appellants but only upon fulfillment by them of a schedule of performance in the sale of the company shares (405). It was not until six months after the corporation was organized that appellants received any of Sanders stock and then only 3,850 shares were delivered. It was six months thereafter before any additional shares were issued to them (412). This is distinctly at variance with the idea of the preconceived plan, as alleged in the indictment, of organizing and splitting up the shares and selling them for the joint benefit of all the defendants.

Appellants are not, however, charged with violating any securities law nor with conducting an illegal sale of any part of these 151,000 shares. The only allegation of the indictment with respect to the sale of privately owned shares has reference to a 35,000 share block alleged as having been issued to Sanders and sold for the common benefit and profit of the defendants. The evidence revealed that 35,000 shares were issued to Sanders, at his own instance, but were almost immediately cancelled. As Sanders testified, "none of that stock was given to the Greenbaums and they never had anything to do with it whatsoever." (356.)

This court said, in *St. Clair v. United States* (C. C.A. 9), 23 Fed. (2d) 76, 79:

> "The stock of an established corporation, having a ready sale on the market, may be sold at a profit on a small commission, while stock of a

> purely speculative character, having no standing on the market, may only be sold through the greatest efforts, and upon a commission that might seem excessive. So an individual or a corporation may by force of circumstances be compelled to pay what might seem an exorbitant rate of interest, or to give what might seem a large bonus in order to raise money in a particular emergency, and yet the agreement to pay the interest or give the bonus may be prompted by honest motives and by sound business judgment. For these reasons, each case must depend on its own facts and circumstances, and the amount of the commission alone cannot be made the sole criterion of fraud."

The company commenced business and made progress but, perhaps, grew too rapidly. The Government's exhibits make a clear chart of the development of the corporation. Within five months from the date of the first permit to sell stock (223) the company had acquired assets, including the Saunders franchise valued at $151,000.00, in the total amount of $454,280.96 (233). Three months after the first permit was issued, Mr. Sanders' lawyer, Mr. Duane Bird, applied for a further permit (229) and advised the Corporation Commission that "the stock issue authorized in said permit No. 6225 has been over-subscribed and the Tucson program has been financed and launched and the company desires now to finance the installation of fifteen stores and a warehouse in Phoenix. Locations for the Phoenix warehouse and stores are now being secured and as soon as you grant the permit for the issuance of the stock necessary to finance the program, the patented fixtures will be ordered from the Clarence Saunders Corporation at Memphis, Tennessee, and the stores

installed and placed in operation in Phoenix as rapidly as possible." (230.) The third application filed by Mr. Bird, dated July 1, 1929 (231), about six months after the first permit was issued, reports, "The company has in operation six stores and a warehouse in Tucson, Arizona, and three stores and a warehouse in Phoenix, Arizona. In addition thereto another store will be opened in Tucson during this month, seven Phoenix locations are under lease and buildings are in the course of construction and should be completed within sixty days, and another location in Mesa has been secured and the store building is now being completed * * *. Barring unforeseen circumstances, nine additional stores will be opened by the corporation by September 1, 1929." (232.)

The financial statement attached to the next permit shows that as of May 31, 1930, the company had acquired assets in the total sum of $1,125,101.14 (236). By the end of December, 1929, the company was in the full swing of its operations, having over $51,000.00 in cash on hand, a quarter of a million dollars in inventories, a large amount of accounts receivable, and fixtures, equipment and automobiles (335). This statement, prepared and approved by Government witness, Brandt, recites a net worth of $884,190.46 and a surplus of $33,780.46.

In a letter signed by the same Government witness, Mr. G. C. Partee, as Secretary of the company, he reported to the stockholders that the company was doing a business of over two million dollars a year and had established, since the first store was opened on June 26, 1929, twenty-four stores (287). Parenthetically, it may be observed that the witnesses for the Government, Partee, Brandt and A. E. Sanders, who, concededly without participation by ap-

pellants, prepared and approved financial statements for submission to the Corporation Commission and to creditors and who made reports to stockholders, were not only not prosecuted or convicted but were used for the purpose of attempting to establish the culpability of appellants.

At the time the company went into receivership, March 19, 1931, at the instance of a stockholder, only $7,609.25 in claims were presented by the creditors. The general accounts payable were less than $19,-000.00, some of which probably became due in thirty days (389). It had $5,600.00 in cash on hand besides the accounts receivable and inventories (389).

During the critical period of the company's existance Sanders, the donee of a suspended sentence, was somewhere in the State of Kansas organizing a new chain of grocery stores, a project with which, it will be conceded, the appellants had no connection whatsoever. In the summer and fall of 1930, according to Brandt (330), and Sanders himself (352), Sanders was absent on the Kansas business. Many other factors combined to weaken the position of the corporation. For example, during the year 1929 Sanders made a single purchase amounting to over $200,000.00 upon which the company took a heavy inventory loss (353).

During the first months Sanders received only a nominal salary but thereafter he drew $1,000.00 a month and later, he said, a minute entry was made for $1500.00 a month, but this amount he did not receive (350). Null, when he testified, said that he didn't remember whether the item of $6,124.74 for life insurance covered the personal life insurance of A. E. Sanders, payable to a personal beneficiary, or

not, and that he considered such a transaction a small one (386, 387), nor could Null state whether the item of expense included the cost of operation of Mr. Sanders' Packard.

The scope of Mr. Sanders' activities and the use to which he personally put the corporation under consideration is revealed in the minutes of the meeting of the board of directors of January 21, 1930, as contained in Government's Exhibit 22 (247). In this meeting at which were preesnt A. E. Sanders, L. E. Sanders and J. M. Nixon (another Government witness) the company was authorized to purchase one-half of the capital stock of Mr. Sanders' Kansas corporation and to guarantee the payment of interest and principal of any debentures issued by the Kansas company up to the amount of one million dollars, the guaranty to be effective only until such time as the Kansas corporation should have acquired assets of over $500,000.00 (247).

When H. D. Sanders came upon the scene with his U-Save Holding Corporation, the control of the company passed into his hands, the books and records were removed from the state (260) and, according to the indictment, over $100,000.00 of merchandise was wrongfully removed from Arizona to California.

In the meantime the ubiquitous Brandt, within a few days after his appointment as Treasurer, had withdrawn $5,000.00 of the corporate funds for, as he testified, Mr. Sanders' Kansas operations (417), but which, as his excluded confession shows, at least to the extent of $2,500.00, was unlawfully embezzled for his own use.

These steps can only spell disaster. It seems to be a harsh commentary upon justice, however, that the

defendant, charged with taking assets out of the state, should not be apprehended, although his address was apparently known (348), that the organizer and head of the enterprise should purchase his liberty by pleading *nolo contendere* and testifying against appellants; that financial statements should be prepared and approved by witnesses for the Government which, if true, demonstrate the truth and not the falsity of the representations charged, while appellants should be convicted largely upon the basis of the testimony of another witness whose peculations and manipulations of company funds, were virtually self-confessed and which could have been proved beyond peradventure of doubt had appellants been given reasonable latitude in their cross-examination.

As has been said, the case when it closed was not the case, in its material aspects, charged by the indictment.

VIII.

THE COURT ERRED IN GIVING TO THE JURY THE INSTRUCTION NOTED IN SPECIFICATION OF ERROR NUMBERED 19.

This instruction which appellants assail upon this appeal is as follows:

> "You are instructed that on the question of the alleged scheme to obtain money or property by means of fraudulent and false pretenses, the Government need not prove all of the fraudulent acts or false representations alleged in the indictment but must prove enough to satisfy your judgment against the presumption of innocence and beyond a reasonable doubt that one or more of the substantial practices, alluded to and speci-

> fied in the indictemnt as fraudulent, as to any or all of the defendants, was wilfully and knowingly employed, the question for you to determine is whether enough has been proven within the lines of the charge and not whether all has been proven" (460, 522).

Under the evidence adduced by the Government, appellants, as has been said, had no connection with the defendant, H. D. Sanders, or with the U-Save Holding Corporation transactions. It will not be disputed, moreover, that no responsibility can attach to appellants with respect to the many letters, notices to stockholders and reports which had to do with the acquisition of control, the consolidation and the efforts to exchange the stock of the corporation under consideration for that of another company. Seven or eight important exhibits were introduced in the face of testimony to the effect that appellants had nothing to do with these happenings. Mr. A. E. Sanders testified (350) "I don't think the Greenbaums had any connection whatsoever with these last two mentioned companies. (Referring to Piggly Wiggly Holding Corporation and U-Save Holding Corporation.) These companies were organized by my brother, H. D. Sanders."

The Government, nevertheless, succeeded in introducing, over objection, Exhibit 52 (279), a letter signed by K. C. Van Atta, as Vice-President of the company; Exhibit 53 (280), a mimeographed letter to stockholders, dated September 29, 1930, signed by A. E. Sanders; Exhibit 54 (281), a notice to stockholders announcing the advent of H. D. Sanders and his associates and the contemplated consolidation with the U-Save Holding Corporation and other companies; Exhibit 56 (289), another mimeographed letter

to stockholders, dated January 15, 1931, signed by H. D. Sanders, as President, and G. C. Partee, as Secretary, stating, among other things, that the U-Save Holding Corporation had purchased the control of the common stock of the corporation in question; Exhibit 4 (211), certificate of amendment to the articles of incorporation changing the name of "United Clarence Saunders Stores, Inc." to "United Sanders Stores, Inc.," signed by H. D. Sanders; Exhibit 5 (212), articles of incorporation of the Piggly Wiggly Holding Corporation of Yuma; Exhibit 6 (213), the certificate of amendment changing the name of the Piggly Wiggly Holding Corporation to "U-Save Holding Corporation" and Exhibit 8 (214) the articles of incorporation of the Piggly Wiggly Southwestern Company.

Though the jury believed, as they must have believed from the testimony, that appellants had no connection with or responsibility for such exhibits, and no connection with the transactions which such exhibits purported to disclose, nevertheless, if they believed also that H. D. Sander's activities constituted a "substantial practice" and fell within the "lines" of the indictment, then appellants were, *ipso facto*, criminally responsible. The instruction ran counter to the evidence and, in its uncertain breadth, involves appellants in any acts practiced or intended by any other defendant whether or not such events tended to a common end. The fact that the court charged the jury that it was the guilt or innocence of appellants which they had to consider, does not aid the instruction under consideration because the language refers broadly to the "defendants" and is not limited to the defendants "on trial." Moreover, the instruction refers specifically to "practices alluded to and specified in the indictment as fraudulent as to *any*

or all of the defendants," thus including the acts not only of appellants standing trial but also the transactions of the five men who were indicted.

It is impossible to tell, moreover, just what the instruction means. The court speaks of one or more of the "substantial practices." What is a substantial practice alluded to and specified in the indictment? One act could not in the nature of things constitute a "practice." The term necessarily contemplates a series of acts of a similar nature carrying with them the implication of persistence and continuation.

The events charged as being part of the scheme, including the organization of the company, the change in its name, the acquisition of the Saunders franchise and the transfer thereof to the corporation capitalizing it at $151,000.00, and the various steps thereafter, could not be denominated a "practice." Certainly the mailing of one letter which is the gist of the offense would not be a substantial practice. The jury were left to guess what the court had in mind without any attempt at a definition, were definition possible.

Let the court put itself in the place of the jury and it will soon discover the perplexities attendant upon this charge. They, with their lay minds, were required to ponder the indictment read to them at the opening of the trial some four weeks before they retired to consider their virdict, in an inexperienced and unguided effort to determine what fell "within the lines of the charge," as contained in the indictment.

It was the business of the court to interpret the indictment for the jury and not to add to their dif-

ficulties by leaving it to them to test the guilt or innocence of appellants indicted by an instrument couched in legal phraseology under an instruction itself ambiguous and in need of explanation.

So to refer the jury to a pleading, be it civil or criminal in nature, has always been condemned.

In *Baltimore & Ohio R. Co. v. Lockwood*, 72 Ohio State, 586, 590; 74 N. E. 1071, 1072, the court in speaking of the practice of referring to the pleadings and stating the issues to the jury, said:

> "It is the imperative duty of the court to separate these, and to definitely state to the jury those issues which are to be determined by it, accompanied by such instructions in regard to each as the nature of the case may require. A failure to do this necessarily leaves the jury to grope around through the technical and often verbose allegations of the pleadings to find the real points of controversy in the case. When there is but a single issue, which is tersely stated, this might not be prejudicial to the parties; but in almost every case there are intricacies which the jury, from lack of legal knowledge and experience, cannot unravel without the assistance of the court."

See also: *Avra v. Karshner, et al.*, 168 N. E. 237, 238 (Ohio 1929).

Another case, the language of which has a direct application to the case at bar, is *Director General v. Pence's Administratrix* (Va. 1923), 116 S. E. 351, where the court, in speaking of an instruction with reference to the failure to exercise due care "as to any duties charged in the indictment," said at page 357:

"It is 'too indefinite, leaving to the jury to say just what the railroad should have done in the particular case.' This, too, we think is a good objection, and we cannot say that it is cured by any other instructions given in the case. It practically turns the jury loose to find the defendant guilty of any negligence which might be based upon a breach of 'any duties charged in the declaration', which declaration covers 10 pages of the printed record. It is not a simple or easy task to analyze the charges of negligence intended to be set forth in this declaration, and it was not safe to impose that task upon the jury."

In *Laughlin v. Hopkinson*, 292 Ill. 82, the court said at page 84:

"It is urged that the court erred in giving to the jury plaintiff's second and sixth instructions, in which the jury were told, in substance, that if the defendant made the representations alleged in the declaration; that such representations were material; that they were false and that they induced the plaintiff to purchase, then the verdict should be for the plaintiff. The objection is that the jury were left to determine, first, what representations were alleged in the declaration; and second, what representations so alleged were material. The instructions are subject to the criticisms made. What were the material allegations of the declaration was a question of law, and it was error to submit that question to the jury."

In *Lerette v. Director General*, 306 Ill. 348; the court said at page 354:

> "It is contended that the court erred in giving certain instructions at the request of appellee which referred the jury to the declaration to determine the issues. This form of instruction has been repeatedly condemned by this court."

Another instruction, similar in import to the charge under consideration was condemned in *Krieger v. A. E. & C. R. R. Co.* 242 Ill. 544, where the court said at page 548:

> " 'The court instructs the jury that if you believe, from a preponderance of the evidence, that the plaintiff has proved his case *as laid in his declaration*, then you will find the issues for the plaintiff'. * * * * The general rule often declared is, that instructions must in a clear, concise and comprehensive manner inform the jury as to what material facts must be found to recover or to defeat a recovery. The rule adopted by nearly all courts is, that the court must define the issues to the jury without referring them to the pleadings to ascertain what they are. Judge Thompson, in his work on trials, (secs. 1027, 2314, 2582) lays down that rule, and says that it is error to leave the jury to construe and determine the effect of the pleadings, whic hare often drawn in technical language and which might not be correctly understood by persons unlearned in the law."

In *Mulroney Mfg. Co. v. Weeks*, 171 N. W. 36 (Ia. 1919), the court, in speaking of an instruction which referred the jury to the issues embodied in the petition, said at page 37:

> "The appellant complains that the instructions

of the trial court in its statement of the issues embodied the entire petition without discrimination, and that they did not in any manner advise the jury as to what were the material allegations necessary for the plaintiff to prove in order to recover. The instructions are fairly subject to criticism in the respect indicated. The petition was rather prolix in its allegations."

In *Arkansas Fuel Oil Co., v. Connellee,* (Tex. 1931), 39 S. W. (2d) 99, the court said at page 101:

"We will notice but one other assignment. Due exception was taken to the instruction given the jury that 'the burden of proof is upon the plaintiff to establish by a preponderance of the evidence the material allegations in their petition'. Instructions in substance the same, have been held to be error on two or more grounds. It is a general charge, improper to be given in a case submitted upon special issues. It improperly refers the jury to plaintiffs' petition to ascertain the allegations as to which they are directed to determine whether same be supported by a preponderance of the evidence."

In *Gorman v. St. Louis Merchants' Bridge Terminal Ry. Co.,* 28 S. W. (2d) (Mo. 1930), 1023, the court said at page 1025:

"The pleadings are addressed to the court and not the jury. The jury can get no enlightenment as to the particular issues they are called upon to try from hearing the pleadings read. And so we have repeatedly held that an instruction which refers the jury to the pleadings for the issues is erroneous."

In *Mack v. State* (Fla. 1917), 74 So. 522, the court said at page 534:

> "It is the duty of the court to state to the jury the issues made by the pleadings; and, while this duty involves a large discretion as to the form and style in which the instructions shall be given, it is generally held to be erroneous to read the pleadings to the jury *or refer them* to the pleadings for the issues by way of instructing them in the law of the case."

In *Lombard-Hart Loan Co. v. Smiley*, 242 Pac. 212 (Okla. 1925), the court said at page 213:

> "The general rule is as stated by Blashfield, in his work on Instructions to Juries, as follows: In submitting the question of fact it is necessary that the issues involved in the case should be stated to the jury and what issues are raised by the pleading is a question of law which it is the exclusive province of the court to determine.
>
> Where the pleadings are voluminous, as in this case, and so involved as to render it doubtful whether the jury could clearly determine the issues, they should be stated to the jury in the instructions. The issues were not defined in the instructions, and the pleadings were given to the jury for their determination as to what the issues were over the objections of the defendant.
>
> The judgment is reversed, with directions to grant the defendant a new trial."

The Supreme Court of Arizona observes the prevalent rule announced by the authorities, only a few of which have heretofore been called to the court's

attention. In *Hines v. Gale*, 213 Pac. 395 (Ariz. 1923), the court said at page 399:

> "It is, of course, the duty of the court to state to the jury the contentions of the parties, and we can see no impropriety in its reading, for that purpose, the complaint. If, however, acts of negligence are charged in the complaint and no testimony introduced to support them—which is this case—the court should be careful to call the jury's attention thereto so that the jury will be under no misapprehension as to the particular questions they are called upon to decide. For instance, the complaint in this case, among other acts of negligence, charges 'that he (brakeman) was not able to get a signal to the engineer in charge of said engine because said engineer was not watching, and was not paying attention to what he was doing'. There is an entire absence of any evidence upon this charge of negligence, and yet it was read to the jury as one of the issues in the case."

The instruction here under consideration, by its broad reference to the indictment, likewise referred to the jury allegations therein as to which, so far as appellants were concerned, there was an entire absence of supporting evidence.

Because the instruction conveyed to the jury the task of the court in language difficult or impossible even for a lawyer to comprehend and because, moreover, it left the jury to infer culpability on the part of appellants for acts and transactions with which they had no connection, it was clearly and prejudicially erroneous.

IX.

THE COURT ERRED IN GIVING TO THE JURY THE INSTRUCTION NOTED IN SPECIFICATION OF ERROR NUMBERED 20 (467, 523).

The instruction under consideration is as follows:

> "It is common knowledge that nothing is more alluring than the expectation of receiving large return on small investments. Eagerness to take chances for large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than one has parted with appeals to the cupidity of all".

To assume to tell the jury what is "common knowledge" is always, the courts have said, accompanied with dangerous consequences. If a fact or a condition be a matter of common knowledge, there is usually no necessity of calling attention to it, and if it be not, then, of course, the jury are misdirected. The observation that "nothing is more alluring than the expectation of receiving large return on small investments" is not necessarily justified by the experiences of life. To the scientist, his science, to the artist, his product, to the physician, the recovery of his patient, to the lawyer, the welfare of his client, to the court, the assurance of justice, is more alluring than expectation of gain. It could have been only the prosecutor's zeal and his contagious, convicting complex that could have induced him to tender such a gratious instruction. To give it was an outright invasion of the province of the jury. As the court said in *Woodward Iron Co. v. Sheehan* (Ala. 1910), 52 So. 24, 26, "It also assumed to declare common knowl-

edge in respect of a matter of which there could not be, nor was, common knowledge."

The use of the word "alluring" with its implication of a "lure" or "bait," the unjustifiable reference to "lottery schemes," leaving the jury to infer a likeness between the enterprise at bar and gambling transactions which are expressly declared to be illegal, the language with reference to the appeal to the "cupidity of all," could not but be as prejudicial as unwarranted.

Apt illustrations are tolerable and sometimes helpful, but those which are inapt are not only irrelevant but misleading.

As the court said in *Neel, et al vs. Powell,* (Ga. 1908) 61 S. E. 729, 731:

> "Illustrations which are apt and clearly made, and are not so extended as to withdraw the attention of the jury from the issue to be determined, are not generally erroneous, and may sometimes be beneficial. Illustrations which are inapt or irrelevant, or are so made as to confuse or mislead the jury, are to be avoided. Illustrations of the latter class shed darkness upon a case, rather than light."

In its wisdom and experience this court knows that after a long trial the jury wait upon the final words of the court, which are the last words they are to hear, with natural and proper respect and attention. After the prosecutor closed his heated denunciation there fell upon the ears of the jury the words "nothing is more alluring than the expectation of receiving large return on small investments"; and "eagerness to take chances for large gains lies at the foundation

of all lottery schemes"; and "the prospect of receiving more than one has parted with appeals to the cupidity of all." What, it may be asked, were the jury expected to deduce from these words? How could the language be of assistance to them in their deliberations? Exactly what proper function did this instruction fulfill?

Infinite difficulties perplexed the prosecution when the case closed. The defendant-witness whom it called as its own, had contradicted himself. The corporate records showed his activities in his management and treatment of the corporation to be reprehensible. Above all he had affirmatively denied fraudulent intent. The proof of financial condition depended upon summaries based upon books known to be falsified. The income tax cards had been shoved into the record by main force. Without further repetitive enumeration, the Government's case, at best, tilted precariously upon its inadequate foundation. It is at such times when an instruction, indeed an unfortunate phrase or word, may be fraught with inexcusably fatal consequences, and it is then when the court should exercise the most painstaking care and circumspection in his final charge.

CONCLUSION

The time is propitious for some strong court to exert its steadying influence upon the law applicable to mail fraud cases. It has been said, with considerable justification, that trial courts, feeling themselves a part of the machinery of the same Government which prosecutes, have come subconsciously to join forces with district attorneys to bring about the end sought by the prosecuting arm of the nation. There has been a tenuous stretching and straining of legal

principles to uphold indictments returned and judgments rendered until, it seems, each case depends upon the temper and ethical concepts of the court and jury who happen to participate in the trial.

It is neither law nor justice to compel men to stand trial under an indictment as defective as the one at bar, nor is it fitting and proper to sustain a conviction which depends upon unsupported accountants' statements made from records none of which were introduced and not all of which were even present in court, such books as were present not being identified at all for an important period and having for their identification, so far as it went, the testimony of the very man who admitted falsifying them. When to this is added the admission of the income tax memorandum cards, the correctness of which was not vouched for, exhibiting figures copied from original returns which were made by a party unknown and which contained information and computations gathered from, and calculated upon, still other records, the sources not even being described, the case presents a situation not only of leniency extended to a prosecutor but also of downright laxity.

True, the law must ever go forward to meet the developments of social and economic life, but when appellants were subjected to the impact of the Null summaries and the income tax cards without opportunity to test their correctness, the court went back into the centuries when a man was guilty or not, as he failed in, or withstood, primitive, physical tests over which he had no control.

From the studied opinions by this Honorable Court it is confidently believed that it will not approve a judgment of conviction which transposes the burden of proof and the presumption of innocence.

It is humbly prayed that the judgment appealed from be reversed.

Respectfully submitted,

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No. 7695

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUS B. GREENBAUM, CHARLES GREENBAUM and WILLIAM GREENBAUM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

BRIEF FOR APPELLEE

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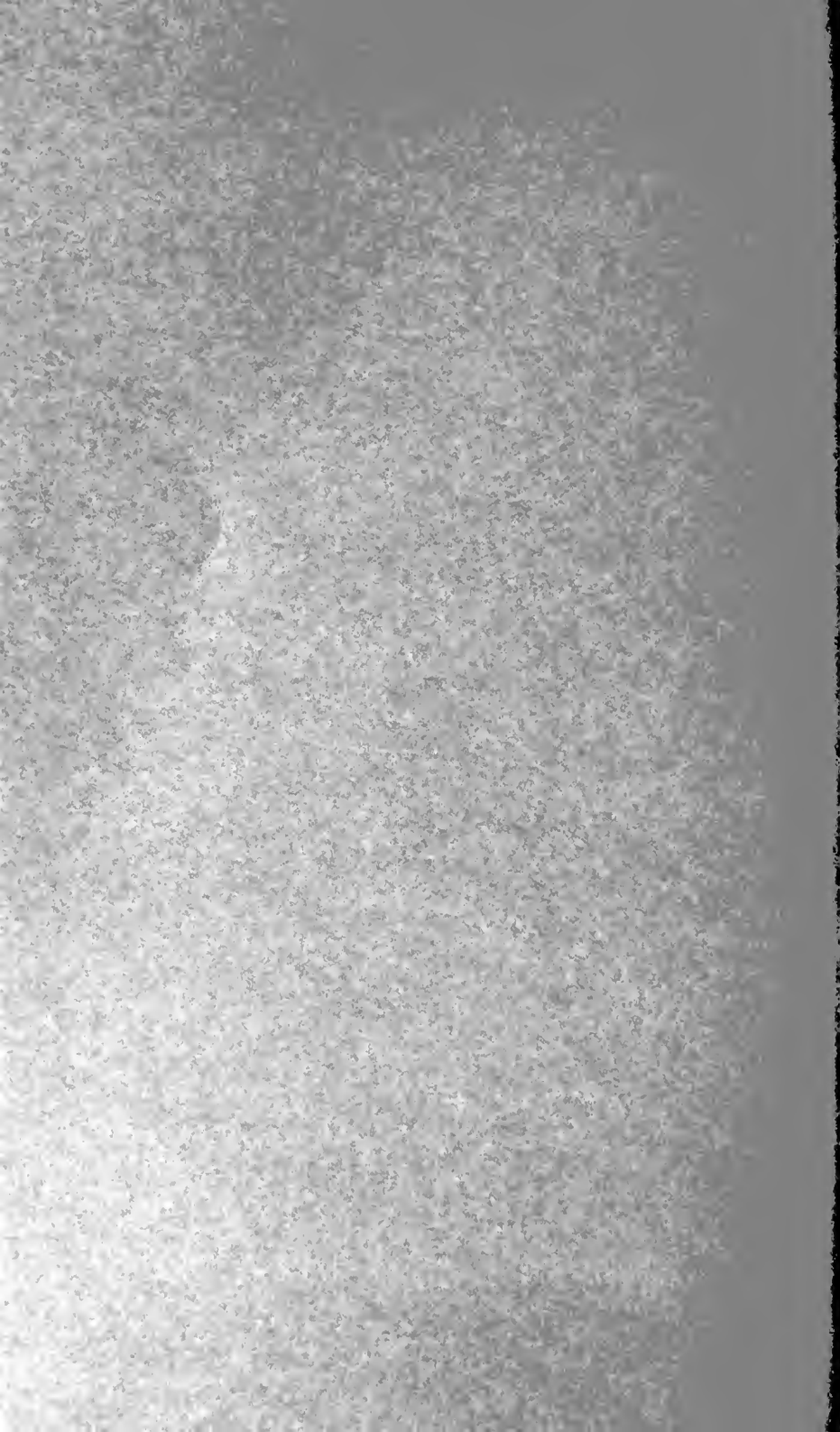

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BRIEF FOR APPELLEE

OPENING STATEMENT

The "statement of facts" contained in appellants' brief could more properly be indexed "argument". The so-called "facts" are largely conclusions of law and facts based upon a part of the record only. We

shall, in our answers to the questions raised by the brief, supply the material part of the evidence necessary to arrive at the ultimate facts proved by the Government. At this point, however, we deem it advisable, and feel it will be helpful to the Court, to point out a few of the instances where appellants have drawn erroneous conclusions from the evidence.

In referring to the Clarence Saunders Stores, Inc., under its various corporate names, we shall follow the practice adopted by appellants and refer to it as "the corporation" or "the company".

On page 11 of appellants' brief is the statement that appellants had nothing to do with the organization of the company. If by this is meant that appellants signed none of the applications or incorporation papers and were not named as incorporators, the statement would be true. The testimony, however, makes it clear that appellants were not only interested in the incorporation of the company but took an active part in the preliminary conferences and negotiations. Mr. Sanders testified that he had a conference with William Greenbaum in the latter part of 1928 "in which he asked me if I thought *we* could get a concession from Clarence Saunders" (345).* The word "we" is significant, as appellants' apparently realize, for in their brief the testimony is edited by substituting the word "he" (meaning Sanders) for "we" (meaning the Greenbaums and Sanders). The record shows that the matter was discussed with all of the appellants several times (345). Sanders further testified that he went to his attorney's office,

* Unless otherwise indicated, figures in parentheses refer to pages of the printed transcrip of record.

accompanied by at least one of the appellants, and that there was a discussion about preorganization stock (345). Appellants had been selling some stock for Sanders in the Piggly-Wiggly Southwestern Corporation and it is apparent that, following the conclusion of that business, appellants themselves conceived the idea of capitalizing on the name of defendant A. E. Sanders by securing a concession from Clarence Saunders and using it as the basis of a stock selling scheme. They did not even want to wait until the corporation had been formed but immediately suggested the sale of preorganization stock. One of the appellants accompanied Sanders to Tennessee to interview Clarence Saunders (345, 352).

Attached to and a part of Government's Exhibit 16 (231) is a statement of the condition of the company, prepared and presented by Sanders' attorney to the Arizona Corporation Commission. Appellants, on page 17 of their brief, claim that this statement shows the progress being made by the company. The application (Government's Exhibit 16) was admitted as evidence of one of the steps in completing the scheme charged. The representations contained in this exhibit are evidence only that such representations were made. In no way could this evidence be considered as proof of the financial condition of the company. We consider this of minor importance, however, in the determination of this appeal. On the question of the sufficiency of the evidence, we are confident that the evidence preponderates so overwhelmingly on the side of the Government and so conclusively proves the guilt of appellants that the Court will have little trouble disposing of that issue.

Let us now examine Government's Exhibit 18 (245), which, on page 19 of their brief, appellants say shows a total net worth as of May 31, 1930, of $966,413.88. We desire to point out to the Court how it was possible, as a matter of bookkeeping, to show this net worth. Later we will call the Court's attention to the record where there is proof that appellants knew the true condition of the company as to there being any earned surplus. The Court is well aware of the fact that items such as accounts receivable, carried as an asset of $135,685.99 (236), might not be worth ten cents on the dollar. It will also be plain to the Court, after reading the record in this case, that the item "concessions", carried as an asset of $151,000, was of no value to the corporation. The stock subscription item of $122,030.51 (237), when and if paid, must be offset by a liability item of "stock outstanding". Practically all of the deferred charges carried as an asset at $79,903.93 (237) are, in fact, expense items and finally under "liabilities" we find "capital stock" carried at $10.00 (237), with no indication of the number of shares outstanding.

If appellants contend that the condition of the company warranted the extravagant representations made by them, they should have introduced some evidence to overcome the direct evidence of the Government which conclusively proved the condition of the company, the false representations of appellants and the fact that they knew they were false.

What we have just said is true also of Government's Exhibit 22 (249) referred to on page 19 of appellants' brief. In this statement common stock is carried as a liability at $10.00 only. The item "other

assets", carried at $520,887.98, undoubtedly is made up, among other things, of "stock subscriptions" and "concessions", either one of which would wipe out the surplus shown.

On page 30 of appellants' brief, an effort is made to create the impression that the surplus shown on the statement of December 31, 1929, Government's Exhibit 40 (335), was an earned surplus. It is true that Brandt testified he could not determine from the *statement itself* whether it reflected an earned or capital surplus. He did testify, however, from his own knowledge, that it was a capital surplus (337). The Court will note that in this statement, outstanding common stock is still carried as a liability at $10.00 (336). This statement is more enlightening than the previous ones, however, for it shows that there were 216,581 shares outstanding. None of these shares sold for less than $5.00 and the price ranged from that to $10.00. It does not take an expert accountant to discover what would become of the $33,780.46 capital surplus shown in this statement if a proper charge had been entered for outstanding stock.

We cannot permit to go unchallenged the gratuitous reflection on the addition of the accountant found at the top of page 38 of appellants' brief. The record shows that while under examination on the stand, the witness made a mental calculation, adding three numbers of six figures each, $304,644.88, $215,378.47 and $151,000, and estimated the total at *about* $679,000. It is apparent that the figure was an approximation only (380).

ARGUMENT

We will now proceed to points raised in appellants' argument and will discuss them in the same order they appear in appellants' brief, beginning with Proposition I, on page 86.

I

SUFFICIENCY OF INDICTMENT

This proposition is based upon Specification of Error I. Appellants contend that the indictment is defective because it is vague, indefinite, uncertain and incomplete, and also because it is duplicitous. The authorities cited by appellants in support of this contention are to the effect that an indictment, suffering with the disabilities above enumerated, is insufficient to support a conviction, with all of which we readily agree. Appellants meet with difficulty, however, in applying this well established rule of law to the indictment under consideration. They failed to cite a single case involving violation of Section 338, Title 18, United States Code, where an indictment in the form of the one involved was held defective.

The gist of the offense is the use of the mails to defraud. The scheme need not be pleaded with all the certainty as to time, place and circumstances required in charging the gist of the offense.

Brady v. *United States*, 24 F. (2d) 399, 402.

Redmond v. *United States*, 8 F. (2d) 24.

Mathews v. *United States*, 15 F. (2d) 139.

Cowl v. *United States*, 35 F. (2d) 794, 798.

All that is required is to set forth the scheme with sufficient certainty to acquaint the defendant with the charge against him and to enable him to prepare his defense. In the Brady case, supra, the Court said:

> "The indictment clearly alleged that the purpose of the scheme was to defraud the Union National Bank by obtaining money and property."

The present indictment clearly alleges that the purpose of the scheme was to obtain money and property from the persons named and the public generally by means of false and fraudulent pretenses, representations and promises (3). The allegation of the indictment that "prior to the dates on which letters were mailed, as hereinafter alleged in the several counts * * * " has been approved by the courts.

Hyney v. *United States*, 44 F. (2d) 134, 136.

Munch v. *United States*, 24 F. (2d) 518.

Chew v. *United States*, 9 F. (2d) 348.

In the Hyney case just cited, the allegation was as follows:

> "That before and at the several times of the commission of the several offenses hereinafter set forth, defendants had devised and did devise a certain scheme * * * ". (44 F. (2d) 136).

This allegation was attacked on the ground that it alleged several different schemes. In upholding the indictment, the Court said at page 136:

> "It is, of course, necessary that each count should embrace a distinct offense but this may be accomplished by proper reference in any one count to any other, as was done in this case, the first count referring to the dates of the different offenses as set forth in the succeeding counts * * * ".

This case fully answers appellants' contention that they were confronted with a claim that they devised a single scheme on various dates, and that they mailed a letter ten months before the final fruition of the scheme.

The first count of the present indictment was sufficient in itself, even if the sustaining of the demurrer to the remaining counts removed the point of reference as to those dates. The courts hold, however, that the point of reference is not lost under those circumstances.

Burroughs & Cannon v. *United States*, 290 U. S. 534, 544.

Crain v. *United States*, 162 U. S. 625, 633.

While the matter is mentioned in the brief, appellants do not cite any authorities in support of their attack upon the allegation in the indictment charging "a scheme and artifice to defraud *and* to obtain money, etc." In many of the reported cases, we find this allegation in the conjunctive, as in the present indictment.

Crane v. *United States*, 259 Fed. 480 (C. C. A. 9).

We have found no case where the indictment was held to be defective because of such an allegation.

It is also true that the practice of alleging in successive paragraphs parts of the scheme is followed in most of the cases involving this same offense, and this practice has been approved by the appellate courts.

Havener v. *United States*, 49 F. (2d) 196.

Brady v. *United States*, 24 F. (2d) 399.

The case of *Fontana* v. *United States*, 262 Fed. 288, relied upon by appellants, is easily distinguishable from the present case. Fontana was charged with violation of the Espionage Act. In that case, the statements which the defendant was charged with making were the gist of the offense. It was necessary, as the Court said, that it be made to appear from the allegations of the indictment that the statements were made at a time and under such circumstances as to clearly show a violation of the law. In the present case, the representations appellants are charged with making are not the gist of the offense. The making of these statements in itself violated no Federal statute. It is a universal rule adopted by all courts that the scheme need not be pleaded with all the certainty of the gist of the offense.

We quote from *Brady* v. *United States*, supra, page 402:

> "While the formation of a scheme or artifice to defraud is an essential element of the offense

defined in section 215, supra, the gist of the offense is the use of the mails for the purpose of executing or attempting to execute such scheme, and it is therefore sufficient to charge the scheme with such particularity as will enable the accused to know what is intended and to apprise him of what he will be required to meet on the trial."

Cowl v. *United States*, 35 F. (2d) 794, 798.

Havener v. *United States*, 49 F. (2d) 196, 198.

The indictment warned appellants with sufficient definiteness of what they would have to meet. They knew that they were charged with selling and offering for sale the capital stock of the Saunders Corporation and with making false representations to the purchasers and the public generally with respect to the financial condition of the company, the management, payment of dividends and the value of the stock. Approximately two years elapsed between the date of the return of the indictment and the trial of the case. If appellants required any more specific information than that contained in the indictment in order for them to properly prepare to meet the charge, their remedy was to ask for a bill of particulars.

Appellants' second contention under the first proposition is that the indictment is duplicitous. They contend that the allegations to the effect that the U-Save Holding Corporation acquired a majority of the capital stock of the United Sanders Stores and removed certain merchandise, charged a separate scheme to defraud stockholders. It must be remembered in this connection that there are five defendants named in

the indictment, including A. E. Sanders, who entered a plea of nolle contendere, and H. D. Sanders, who was not on trial. The failure in the proof to connect H. D. Sanders with the scheme charged, if there was such failure, would not affect the guilt of any of the other defendants. The gaining control of the company by the U-Save Holding Corporation and the removal of merchandise might, as claimed, be a fraud on stockholders but that would not prevent it from also being a part of the original scheme to defraud and obtain money or property by false representations. Quite frequently false representations are made in connection with successful enterprises. The success or failure of the undertaking does not enter into the guilt of the party. In many cases it is a part of the scheme that, in the event the undertaking is successful and makes a profit, this profit will be confiscated by the schemers for their own advantage and to prevent the victims from enjoying the expected or unexpected profits. The failure of proof of this phase of the scheme does not affect the validity or sufficiency of the indictment.

Butler v. *United States*, 53 F. (2d) 800.

Havener v. *United States*, 49 F. (2d) 196, 199.

Cowl v. *United States*, 35 F. (2d) 794, 798.

Marcante v. *United States*, 49 F. (2d) 156, 158.

Kaplan v. *United States*, 18 F. (2d) 939, 943.

There is but one scheme charged in the indictment and that was the scheme to obtain money and prop-

erty by the sale of stock and debenture bonds of the Clarence Saunders Stores and its successors by false and fraudulent pretenses, representations and promises. The organization of the corporation was not the scheme itself, nor was another scheme hatched under the name of Greenbaum Brothers and the Bond & Mortgage Company. These acts alleged in the indictment and proved by the evidence were merely the means used in carrying out the original scheme. This applies also to the charges in connection with the organization of the Piggly-Wiggly Holding Corporation, the changing of the name, the acquiring by the U-Save Holding Corporation of a majority of the common stock of the company, etc.

It was not necessary for appellants to have had an active part in the Piggly-Wiggly Holding Corporation or the U-Save Holding Corporation or the removal of the merchandise. All who, with criminal intent, join themselves, even slightly, to the principal schemer are subject to the statute, although they know nothing but their own share in the aggregate wrong doing.

Silkworth v. *United States*, 10 F. (2d) 711.

Schwartzberg v. *United States*, 241 Fed. 348.

Wilson v. *United States*, 190 Fed. 427.

The above and other authorities also hold to the effect that an indictment which sets forth two modes of operation by which defendants plan to carry out their scheme to defraud is not duplicitous.

McLendon v. *United States*, 14 F. (2d) 12.

Gourdain v. *United States*, 154 Fed. 453.

The scheme to defraud and the means by which it was to be carried out are to be distinguished from each other. L

Sunderland v. *United States*, 19 F. (2d) 202.

The unity of the alleged scheme and artifice to defraud sufficiently appears from the indictment and the various means to that end which the indictment charges do not, in themselves, constitute allegations of separate schemes.

Scheib v. *United States*, 14 F. (2d) 75.

The case just cited is very similar to the case under consideration. The scheme charged had for its purpose selling to the public stock of the Hawkins Mortgage Company and its subsidiaries, various so-called welfare societies. It is charged that the defendants encouraged the Hawkins Mortgage Company to purchase or otherwise obtain control of other mortgage and loan companies which were supposed to be in trouble but which had assets of value, and to enter into arrangements whereby the Hawkins Mortgage Company would control the Board of Directors of such other companies, and through false representations as to the value of the stock induce those who held stock or controlled interest in such other companies to exchange same for stock of the Hawkins Mortgage Company. There were many other details of this scheme set out in the indictment in the Scheib case similar to the allegation in the indictment in the present case. In answer to the charge that the indictment in the Scheib case was duplicitous, the Circuit Court of Appeals for the Seventh Circuit said:

"The general purpose of inducing persons to buy or exchange for stock of the Hawkins Mortgage Company and of the welfare societies, to the distinct disadvantage of such persons, runs through the entire indictment. Surely each separately alleged manifestation of the same general purpose to defraud the public does not constitute a distinct scheme or artifice, but is only a detail in the general plan to induce persons to part with money or other valuable thing in exchange for practically valueless stock. The unity of the alleged scheme or artifice to defraud sufficiently appears from the indictment, and the various means to that end which the indictment charges do not in and of themselves constitute allegations of separate schemes, artifices, or conspiracies." (14 F. (2d) 77).

In a case where the indictment charged a scheme to sell interests in five separate tracts of land which were falsely and fraudulently represented to contain gas, the Court held that the indictment was not duplicitous. None of the letters mailed for the purpose of carrying out this scheme referred to all the tracts.

Sconyers v. *United States*, 54 F. (2d) 68.

If there is but one general scheme to defraud and numerous means for effectuating the same, it is not bad for duplicity.

Worthington v. *United States*, 64 F. (2d) 936.

This is one of the latest decisions on this point.

We quote the following from the opinion in the Sunderland case, supra:

> "In the case at bar the contention of plaintiffs in error is that the indictment sets out two schemes to defraud; that it sets out two groups of defendants; each group being engaged in a separate scheme - - One group being engaged in the sale of securities of the Guaranty Securities Company and its allied companies and banks, the other group being engaged in the sale of securities issued by the Colonial Timber & Coal Corporation.
>
> "This contention fails to grasp the full scope of the indictment. The offense charged in each count, except the conspiracy count, is the use of the mail in furtherance of a scheme for obtaining money by means of false and fraudulent representations. The indictment alleged that one group of defendants were in control of certain trust companies and banks; that they, in cooperation with a second group of defendants, devised a scheme in accordance with which they should form a new corporation, the Colonial Timber & Coal Corporation; that this new corporation, under cooperative management of all the defendants, should issue its stock and bonds and sell a portion of the same to the financial institutions controlled by the first group of defendants; that another portion should be sold to the general public through the same financial institutions; that still a third portion should be allotted without consideration to the defendants themselves; and furthermore, that the same financial institutions, owning among their assets large amounts of bonds and stock of the Colonial Timber & Coal Corporation, should sell to

the public, stock, bonds and certificates of their own issue, based upon their own assets, which included said stock and bonds of the Colonial Timber & Coal Corporation.

"Though the scheme thus alleged was complex in its nature, and manifold in its details, it was but a single scheme in which the ties of cooperation bound together the various defendants, though some controlled one corporation and some another."

Appellants earnestly urge that the allegation in the indictment to the effect that H. D. Sanders and his associates organized the U-Save Holding Corporation, renders the indictment uncertain and duplicitous, first, because it charges a separate scheme and, second, the associates are not named. H. D. Sanders was one of the defendants and any acts of his, committed in furtherance of the scheme, would be chargeable to each of the co-defendants. This does not mean, however, that every individual with whom H. D. Sanders associated himself or did business with, would thereby become one of the schemers and liable to prosecution. His associates in the organization of the U-Save Holding Corporation might or might not have been knowingly engaged in the plot or scheme alleged in the indictment. Here, again, if appellants required any more specific information, their remedy was to ask for a bill of particulars.

We will not attempt to discuss or analyze all of the cases cited by appellants in support of their first proposition. Those involving violation of the liquor laws and the joining together in a single count in an

indictment two separate and distinct crimes or offenses are clearly not applicable. In discussing these cases in their brief appellants set out enough of the facts from which the inapplicability of these cases clearly appears and we are willing to submit them to the Court upon the statements contained in appellants' brief. We will discuss only those where a violation of the mail fraud statute is involved.

In *McLendon* v. *United States*, 2 F. (2d) 660, the indictment charged defendant with having devised a scheme to defraud in the execution of which he mailed circulars containing misrepresentations regarding dogs which were offered for sale. The indictment was in eight counts and defendant was convicted on counts 1 and 3. The Court said that a verdict on the first count should have been directed because the proof did not tend to show the use of the mail in the execution of the scheme alleged. The Court said, however:

> "We do not reach the same conclusion as to count 3."

The letter specified in count 3 was held to contain matters that were pertinent to the scheme of the indictment. The case was remanded for a new trial because of errors not pertinent to the issues in this case. The indictment itself was upheld and we fail to see what comfort appellants can derive from the decision.

If we were to admit all that appellants say in regard to the counts involving letters written in connection with the exchange of stock of the Saunders Company for stock in the U-Save Holding Corporation and concede that those letters were not written and mail-

ed in execution of the scheme alleged in the first count, under the McLendon decision, relied upon by appellants, the indictment as to the first count should be upheld, applying the reasoning of the McLendon case. The failure of the subsequent counts because of the defects claimed by appellants, would not destroy the effectiveness of the first count.

The case of *Beaux Arts* v. *United States*, 9 F. (2d) 531, relied upon by appellants, does not support appellants' position in this case. There the Court held that there was a misjoinder of offenses. The indictment was in three counts. One of the counts was dismissed by the trial court, a verdict of acquittal returned as to one count and a verdict of guilty as to the other count. The Court held that the verdict of acquittal cured the defect of misjoinder and affirmed the judgment on the remaining count. The appellants in this case are relying on some of the counts to which a demurrer was sustained to establish that the first count was duplicitous and that there was a misjoinder. This, of course, they cannot do. They are limited to the first count alone. If there are any fatal defects in that count, those defects must be made to appear from the language of that count itself and the two cases just discussed and cited in appellants' brief support the Government's position.

II

ADMISSION IN EVIDENCE OF STATEMENTS PREPARED FROM BOOKS OF ACCOUNTS

This proposition covers the objection of appellants to the introduction in evidence of Government's Ex-

hibits 89, 90 and 91. Exhibit 89 is a profit and loss statement of the corporation for the year 1929 (366). Exhibit 90 is a similar statement for the period ending September 30, 1930 (374). Exhibit 91 is a balance sheet showing net worth on September 30, 1930 (378).

Appellants' contention is that the books and records underlying these exhibits would not be admissible against appellants and that, therefore, the statements themselves were not admissible. We believe that the determination of the admissibility of the books and records will determine the merits of appellants' Proposition II.

On page 129 of their brief, appellants set forth the grounds upon which Proposition II is based. Appellants' contention that, because they had no connection with the books and had no control over them, the books would be hearsay as to appellants, has no support in the authorities cited by appellants and we have found none supporting that theory.

The Government, having produced evidence of representations made by appellants relative to the financial status of the corporation, its management, earnings, profits and future prospects, it then became incumbent upon the Government to prove the falsity of one or all of these representations. The books and records were competent evidence to prove the facts which, in turn, would prove the falsity of appellants' representations.

Butler v. *United States*, 53 F. (2d) 800, 806.

Quoting from *Butler* v. *United States*, supra (806):

> "It is objected that there was no proof that appellant made the entries in the books nor that he was responsible for them, and cases are cited where defendants were charged with making false entries and proof was properly required that the defendants either made the entries or were responsible for them being made. But there is no such charge here; the contents of the books were offered to prove a fact material to the inquiry. Books of account are often received to prove a material fact, where the opposite party has no connection with the books or the business reflected by them.
>
> *Barrett* v. *United States* (C. C. A. 8) 33 F. (2d) 115."

The authorities cited by appellants in support of their position are easily distinguishable from the case at bar. We believe it will only be necessary to point out this distinction as to one or two of the cases.

Appellants cite *Osborne* v. *United States*, 17 F. (2d) 246. They claim that the grounds of admissibility in the Osborne case are not present in the case at bar. The two cases are entirely different. While the Osborne case was a prosecution for the use of the mails in a scheme to defraud, the books were offered in evidence to prove the actual fraud. The defendants were accused of selling the same tract of land to different purchasers. The books were offered for the purpose of showing that the tracts actually were so sold. Under these circumstances, it would, of course, be necessary to connect the defendants with the books

and to show knowledge on their part of the contents. The purpose of the books in the case at bar is to prove a fact, namely, the condition of the corporation. They were competent evidence of that fact, irrespective of whether they were kept by the defendants or not.

The case of *Chaffee & Co.* v. *United States*, 18 Wall. 516, 21 L. E. 908, cited by appellants, was a civil suit to recover a penalty under the Revenue Act for having possession of distilled spirits. Books of certain collectors of tolls were offered in evidence. We believe this statement is sufficient to show that the rule under a situation such as existed in the Chaffee case is entirely different from the rule applicable to the facts in the present case.

In the civil case of *Hagan Coal Mines* v. *New State Coal Company*, 30 F. (2d) 92, cited by appellants, a summary taken from the books of the defendant was introduced in evidence in defendant's favor for the purpose of proving a claim against plaintiff. It is obvious that the fact sought to be proven in the Hagan case is entirely different from the fact to be proven in the present case. It is also clear from the opinion in the Hagan case that there was a total lack of any foundation for the introduction of the summary. The only evidence in that connection was that the books were the books of the defendant.

We are not contending that the keeping of the books was, in itself, a crime. There was evidence introduced tending to prove that appellants knew that the representations made by them were false. The representations which are found in several of the letters and circulars in evidence, to the effect that the

corporation was a "Clarence Saunders" corporation and "under the guiding hand of Clarence Saunders" (275, 296), were known by them to be false or were made in reckless disregard of the truth. Government's Exhibit 45 (275) contains the following statement:

> "You will find that your investment in Clarence Saunders Stores will be one of the most profitable ever made", and "with Clarence Saunders' guiding hand over the different stores to be established under his name, * * *".

In Government's Exhibit 63 (296), which was a letter from the Bond & Mortgage Company (appellants' corporation) the following statements occur:

> "The stores were created by a genius in this particular line of merchandising. Clarence Saunders, through his wonderful merchandising methods, established the Piggly-Wiggly stores, and when retired had built a business in a few years that was prosperous and known all over the world, and his new stores are just as much advanced in modern merchandising as his old stores were over the old style grocery. With Clarence Saunders' guiding hands over the different stores to be established under his name, we can only say one thing and that is, within a few years you will find Clarence Saunders Stores the outstanding food distribution stores in the world."

Part of the foregoing quotation is almost identical with statements found in letters sent out over the stamped signature of A. E. Sanders.

Appellants took part in the preliminary negotiations for the incorporation of the company (345), and they therefore must have known that Clarence Saunders' only connection with the corporation was a franchise which permitted the use of his name and fixtures. Furthermore, the appellants knew the financial standing of the corporation for they were furnished statements taken from the very books and records upon which the questioned exhibits were based (334). They knew the corporation was not earning profits and they knew that dividends were paid out of capital rather than earned income (329-330).

Government's witness Brandt testified that Gus Greenbaum, one of the appellants, was present in a conversation between the witness and Mr. Sanders when the statement was made that the corporation had no earnings (329) and a record showing the operating loss was produced (330). The evidence, therefore, shows that appellants had knowledge of at least some of the contents of the books and records marked for identification and used as a basis for the exhibits. Knowing what they did about the corporation, their misrepresentations not only as to the present condition of the corporation but as to its future, were made either knowingly or with such reckless disregard of the truth as to render them criminally liable under the statute involved. 49 C. J. 1204, Sec. 225. In this connection, it is important to remember that it is not the representations themselves that constitute the crime. It is the use of the United States mails.

Appellants complain that the questioned exhibits do not cover the time of the alleged commission of the crime and that the periods covered by the exhibits are

too remote to constitute proof of the falsity of appellants' representations. Exhibit 89 is a profit and loss statement covering the year 1929. The representations of appellants as to the financial condition of the corporation, its management and its earning of profits refer to this period of the corporation's history. It is not necessary that the misrepresentations be made the day the mails are used. The same is true of Exhibit 90 and Exhibit 91, which covered the earnings of the corporation for the period from January 1, 1930, to September 30, 1930. We believe that the weight to be given this evidence under all the circumstances was for the jury. It is true the indictment letter was mailed April 9, 1930. That date comes within the period covered by these exhibits, and the date September 30, 1930, falls within the period covered by the representations of appellants as to the condition and management of the corporation.

Furthermore, appellants made repeated representations as to the future development, growth and earnings of the corporation. These representations were based upon premises known by appellants to be false, and only a miracle could have prevented such representations from being false. The condition of the company on September 30, 1930, as well as the fact that it operated at a loss during the first nine months of 1930, would be competent evidence of the falsity of those representations, just as would the fact that shortly thereafter the company went into receivership.

Richards v. *United States*, 63 F. (2d) 338, 340.

Had appellants' representations as to the future prospects been based upon a true condition or premise

at the time they were made, and had some factor intervened between the time of the representations and the date of the statements (Exhibits 91, 92), which intervening factor had brought the change in the fortune of the company, there might be some merit in this contention of appellants. One cannot, in the face of present conditions and facts, make representations, not only as to those conditions and facts but as to the future, when such representations are contrary to all reason and possible expectations.

Appellants contend that reversible error was committed because they were not given sufficient time to examine the books and records. The same procedure was followed in this case that has been followed in all cases involving fraudulent use of the mails. If defendants can wait until the day of trial and then demand time in which to audit books and records, the trial of this class of cases, which even under present practice is often too long delayed, would be postponed and continued to such an extent as to render the statute ineffectual. The books in this case were not seized by the Government at the initiation of the prosecution. They were never under the Government's control. From the record it appears that the books identified in Court had been in the hands of the receiver (266-267), or in evidence in litigation pending in the State Court (372-373), for a long period of time. One of the defendants, A. E. Sanders, was an officer of the corporation. The books, while in the hands of the receiver or while in the possession of the Clerk of the State Court, were as available to appellants as they were to the Government.

The indictment was returned against appellants in

February, 1933, approximately two years prior to the trial. Appellants were represented by able and resourceful counsel, who must have known how to gain access to these books, and who must also have known that these books would play an important part in the trial. One of the financial statements of June 30, 1930 (250), bears the certificate of John W. Wagner, C. P. A. The same John W. Wagner was sworn as a defense witness at the beginning of the trial, excused from the rule and remained in Court during the trial (137), but was never called to the stand. In view of the foregoing facts, the contention of appellants that they had not sufficient time to examine the books and records is wholly lacking in merit, not to mention sincerity.

It is not necessary to introduce in evidence the books and records themselves. It is proper to use an auditor to testify regarding the books and as to what they disclose.

Butler v. *United States*, 53 F. (2d) 800, 805.

We quote from page 805 of the above case:

> "It is objected that the books were not introduced in evidence; the books were available to both sides; they were identified, and that is sufficient. To introduce them would have been a meaningless formality. An auditor may testify as to what is disclosed by books of account, if the books are identified as those regularly kept in the course of business, and if the books are available for purposes of cross-examination." (Citing cases).

The same procedure has been approved by this Court.

Arine v. *United States*, 10 F. (2d) 778 (C. C. A. 9).

This leaves as the only remaining question to be determined the question of the identification of Government's Exhibits 34 to 39 for identification, which exhibits were the basis for the auditor's testimony and of Government's Exhibits 89, 90 and 91. We believe that this can best be presented by summarizing the testimony going to the identification of these exhibits.

Government's witness Brandt testified he was "employed by the company from September 15, 1929, to August, 1930"; that during his connection with the company his duties were to maintain the records of accounts and the usual duties of a comptroller (251). He identified the books in Court as the books and records of the company and that the entries were made by parties employed by the company (252). He further testified that, covering the period prior to his employment, he had made an audit balancing the books and that all entries were correct (253-255).

We wish particularly to call the Court's attention to the question and answer set out in haec verba in the transcript (255). This question on cross-examination was somewhat involved and was propounded in the negative. We submit that, upon a careful reading of this question and answer, it will appear that the witness, when he answered "No, those records are only sources of original entry", by the use of the words "those records" referred to the original evidences of the transaction made at the time the transaction takes place, which are referred to in the last clause in the

question, and that the words "those records" in the answer cannot possibly be made to refer to Government's Exhibits 34 to 39 for identification, as this construction would make the answer an incorrect one. We do not believe that even appellants will contend that the questioned exhibits were sources of original entry. The same witness further testified that information received daily from the various stores was compiled from their cash register sales and entered into the regular accounting at the general office (256). It was these cash register records and similar records which witness referred to as "sources of original entry". Witness further testified that sufficient information could be obtained from the books marked for identification to determine the operating expenses, administrative expenses and the net profit and loss of the company. In fact, the information could be obtained from the general ledger (257), Government's Exhibit 39 for identification.

Government's witness G. C. Partee testified (258) that he was employed by the company from January, 1929, to the time of the receivership, as bookkeeper, auditor, secretary and treasurer. At the time Brandt left the company, Partee became auditor and the books were kept under his supervision up to October, 1930 (258), and they were kept in the regular course of business (259). It is well to note here that the books were not used as a basis of any testimony or exhibits concerning the condition of the company after September 30, 1930, and up to that date the books were sufficiently identified. This witness also testified that a total profit and loss statement could be secured from the general ledger (261), Government's Exhibit 39 for identification. This exhibit, the gen-

eral ledger, is a book of original entries. It was in Court and made available to appellants.

Government's witness Earhart, the receiver in the State Court, also identified the books as the books and records of the company (266).

Government's witness Null, the accountant who audited the books for the receiver, identified them (358-359). He also testified that the statement (Government's Exhibit 90) could be prepared from the ledger, and that he could have prepared Government's Exhibit 91 without having made an audit of all the records of the company (383). He further testified that Government's Exhibit 91 was made from the "books in Court" (388) and that the source of his analysis would be limited to the books and records in Court (386). We quote from his testimony, in the transcript:

> "The original entries are here now. Those are the original entries (386). * * * As I stated the books of original entry are in Court, but the original documents back of the books of original entry are not in Court." (389).

It is true that all of the records of the company were not in Court, and some of the original records were not in Court, but all of the original records necessary as a basis for the accountant's testimony and said exhibits, were in Court.

We believe the foregoing excerpts from the record and the testimony of the Government witnesses show ample identification of Government's Exhibits 34 to

39 for identification for the period up to September 30, 1930.

Stephens v. *United States*, 41 F. (2d) 440, 444.

Lewis v. *United States*, 38 F. (2d) 406, 414 (C. C. A. 9).

Foster v. *United States*, 178 Fed. 165, 174.

Quoting from the Stephens case, supra:

> "Ordinarily the party offering such testimony should be required to produce in court or to make available for his opponent's use the documents and books used by the witness, but even that rule is not universally followed and where recognized it is subject to exceptions." (41 F. (2d) 444).

Quoting from the decision of this Court in the Lewis case, supra:

> "The appellants also objected that no proper foundation was laid for the introduction of the books and also to their use for ascertaining the financial condition of the company, on the ground that all of the books of the company and all of its subsidiary and allied corporations were not produced. It was shown that the books produced were the books of account of the company kept for the purpose of recording the business transactions in which the company was involved. This was a sufficient foundation for their introduction for the purpose for which they were offered. If it had been sought to prove some special charge in the

books as a basis for a recovery against the appellants, more evidence concerning the individual book entries involved might have been necessary to make such entries evidence in favor of the company against a third party, but this question is not involved here." (38 F. (2d) 414).

Appellants make much of the testimony of the witnesses on cross-examination, in which they listed some of the records of the company which were not in court. The fact remains, however, that the books in Court and identified were original records and the only records necessary to determine the financial status of the company or to determine the profit and loss of the company. We know of no rule of evidence, and none has been cited by appellants, which would place the overwhelming burden on the Government of producing every voucher, check, sales slip and other subsidiary information that is all merged in the original books of entry in Court.

Appellants also place much stress upon Government witness Null's testimony that, from an examination of the books in Court, he could not certify to an audit based upon those books. To understand this statement, we must understand and take into consideration what is meant by a "certified audit". We believe that the Court will take judicial knowledge of the fact that in order to certify an audit, every entry must be checked against bank accounts, sales slips, checks, vouchers, wholesale receipts, etc. The significance of the word "certify" is clearly brought out in Null's testimony when he says - "In other words, in order to *verify*, I would say *certify*, to that statement

as to its true and correct condition, those books are not sufficient" (369).

It is evident from this statement that what Null meant was that, in the event he was employed to make an audit of the books of any company and required to certify to that audit, he would necessarily have to check the entire records of the company. Such an audit is not necessary, however, where books which contain sufficient information to determine certain facts have been identified, as the books in question were identified by the parties under whose supervision they were kept. It is a fact, however, that Null made such an audit for the receiver and we have his testimony, in addition to the testimony of other witnesses, based upon that audit, that the books in Court were the books of the company and were correct, and it is the Government's contention that, for the purpose for which the books were used, all that the Court or jury needed to be interested in was what Government's Exhibits 34 to 39 for identification themselves reflected. They contained all the information necessary to determine the fact required to be proved. Appellants' contention that the books in question were not correct is based solely upon the claim that they were kept by a self-confessed manipulator and that they contained at least one fictitious entry. This is not borne out by the testimony in evidence. This phase of the case, covered by Government's witness Brandt, will be discussed later in this brief in answer to appellant's Proposition IV. For the sake of brevity, we will not discuss it at this time.

III

ADMISSION IN EVIDENCE OF RECORDS FROM INTERNAL REVENUE OFFICE

Government's Exhibits 109 and 110 were records kept in the office of the Collector of Internal Revenue for Arizona and were introduced in evidence to show that the company had filed income tax returns showing operating losses for the years 1929 and 1930. Appellants contend that the admission of these records constituted prejudicial error.

The case *In re Epstein*, 4 F. (2d) 529, cited by appellants in support of this proposition, is not determinative of the question here involved. All that the Epstein case decides is that the Commissioner of Internal Revenue is authorized, under the statute, to furnish a copy of the income tax return to the person making the same, and to his trustee in bankruptcy, and that the same was admissible in evidence.

The same is true of the case of *Lewis* v. *United States*, 38 F. (2d) 406, in that all the Court held was that all the copies of income tax returns were admissible to show the condition of the company.

The decision in the case of *Lewy* v. *United States*, 29 F. (2d) 462, is to the same effect and goes no further than the other cases above discussed.

Appellants cite the case of *Corliss* v. *United States*, 7 F. (2d) 455, and say that it is completely determinative of this question. The documents introduced in evidence in the Corliss case were not Government rec-

ords, were not signed and were not properly identified. Oral testimony was permitted to show who had signed the original. The documents were offered in evidence for the purpose of proving that the defendants had made sworn statements to the Government which demonstrated that the company's business was not prosperous. It is clear that this fact could not be proven by unsigned copies, not Government records, and which required oral testimony to supply omissions in the documents, which oral testimony was also clearly inadmissible. There is very little, if any, similarity in the two cases. In the case at bar, the exhibits introduced were formal Government records and, as such, no other identification was necessary. It was not necessary to call as a witness the person who made them.

Heike v. *United States*, 192 Fed. 83, 94, 95.

White v. *United States*, 164 U. S. 100.

In the Heike case, supra, on page 94, the Court said:

> "Such records are not covered by the hearsay rule. It is elementary that they are prima facie evidence of what they purport to record."

In the present case the records in question were evidence then of what they purported to record, namely, that the company had filed income tax returns showing a loss. They were not, as in the Corliss case, relied upon by appellants, offered as evidence of a sworn contradictory statement that the company was prosperous. They were not introduced to show con-

tradictory statements on the part of appellants, nor to show that appellants had knowledge of the fact the company was operating at a loss. That fact had already been established by other testimony. As stated above, the exhibits were evidence of the independent fact that the returns, showing a loss, were filed.

Just as the weighers in the Heike case wrote down the weights observed by them on the scales so, in this case, the officials in the Internal Revenue office wrote down on the exhibits the figures observed by them in the returns filed. The weight to be given this evidence was for the jury. Proof of the condition of the company and the fact that it operated at a loss was so overwhelmingly established beyond any reasonable doubt by the evidence in the case that the introduction of these exhibits, even if erroneous, could not possibly be prejudicial enough to warrant the reversal of this case for a new trial. The president of the company, A. E. Sanders, was on the stand, as were Brandt and Partee, the two men who had charge of the books during practically the entire life of the company. These three men knew more about the condition of the company and its profit and loss than any one else. They were available for cross-examination and were subjected to cross-examination, as was the witness Null on the same question. We submit that this afforded the appellants all of the protection necessary to avoid their being prejudiced.

IV

APPELLANTS' CROSS-EXAMINATION OF WITNESS THOMAS H. BRANDT

This proposition is based upon Specifications of Error 9 and 10. Specification of Error 9 (Appellants' Brief, p. 54) is as follows:

> "The Court erred in sustaining an objection of the plaintiff, United States of America, over the exception of appellants, to an offer of proof by appellants, in full substance as follows:"

Then follows the offer of proof made by appellants at the time of trial (425-427).

Specification of Error 10 (Appellants' Brief, p. 56) assigns as error the ruling of the Court in refusing to admit in evidence appellants' Exhibit "F" for identification, consisting of four checks of the Phoenix Packing Company, a corporation, drawn on The Valley Bank of Phoenix, and signed by Tom H. Brandt, as Secretary-Treasurer, and payable to the order of Tom H. Brandt. Much of appellants' argument on this proposition is devoted to the ruling of the Court excluding from the evidence appellants' Exhibit "E" for identification, which was a statement signed by the witness Brandt. The ruling excluding this exhibit is not covered by Specification of Error 9 or 10 or any other specification in appellants' brief. We submit that this constitutes an abandonment on the part of appellants of any contention that this ruling was erroneous.

Furthermore, no proper foundation was made for the introduction of this exhibit. To impeach a witness by showing a prior contradictory statement, a proper impeaching question must be asked. This question must fix the time and place of the prior statement and the question laying the foundation for impeachment must, in addition, acquaint the witness with the substance at least, if not the exact words, of the alleged prior statement. The questions asked the witness were lacking in all of the foregoing essentials and, furthermore, appellants' attempt at impeachment was on a collateral matter brought out on cross-examination (415-418).

Fiske v. *United States*, 279 Fed. 2.

The witness's answer to such questions on cross-examination was binding on the party propounding the question.

The Saranac, 132 Fed. 936.

We quote from paragraph 5 of the syllabus of the case just cited:

> "Where a witness is asked on cross-examination, if he did not make a certain statement, not relevant to any matter brought out on his direct examination, and denies it, his denial is binding on the party asking the question."

Appellants' Exhibit "E" for identification was offered in evidence for the purpose of impeaching the witness Brandt. The statement offered contained many statements consistent with the witness's testi-

mony. It contained much other matter clearly irrevelant. The entire statement was offered in evidence. The ruling of the Court sustaining objection to this exhibit was proper.

New York Central R. R. Co. v. *Dunbar*, 296 Fed. 57, 60.

We quote the following from the opinion in this case:

> "Upon the trial the defendant in error called employees of the plaintiff in error who previously had made statements in writing to their employer. They were confronted with these statements upon cross-examination. Counsel was permitted, under direction of the court, to inquire as to previous statements made, which involved contradictions in their testimony given upon the trial. It was sought to introduce the full statements, and these were objected to. Much of what was contained in the statements was not in contradiction with their present testimony, while some was. Some statements were irrelevant testimony, and opinions given as to the cause of the injury and conclusions as to who was at fault. These statements were properly excluded. The trial court gave full opportunity to counsel for plaintiff in error in using the statements, where any contradictions existed. There was no error in this ruling."

Appellants say that if they had been permitted to demonstrate to the jury that Brandt, one of the Government's main witnesses, was an embezzler, that the jury would have disregarded his testimony. We know

of only one method by which such proof was possible, and that is by proof of the conviction of the witness of the crime. This is such an elementary and fundamental rule of evidence that we will not burden the Court with citations of the unlimited number of authorities where this rule has been repeatedly announced. We know of no exception to the rule and are surprised that appellants seriously argue that they should have been permitted to impeach a witness in the manner attempted by them at the trial.

The statement itself would not be proof of the facts contained in the statement.

28 R. C. L. 645.

MacLachlan v. *Perry*, 68 F. (2d) 769, 772.

The argument that Brandt's testimony to the effect that the company had no funds with which to pay dividends on December 31, 1929, is contradicted by the statement prepared by him, Government's Exhibit 40 (335), because the statement shows cash on hand in the amount of $51,326.72, is so fallacious as not to require serious consideration. Dividends, of course, are payable out of profit or earned surplus only. The same statement (Exhibit 40) shows current liabilities in the amount of $117,458.33, exceeding several times the amount of cash on hand. This is not the first company which found itself in serious trouble because it had paid dividends out of cash on hand which should have been applied to just obligations to its creditors. This argument on the part of appellants is followed by a more fallacious and illogical one on page 83 of the brief, in connection with the testimony of Brandt that

there was no money to pay dividends in June, 1930. Appellants argue, with apparent earnestness and sincerity, that, because a financial statement of the company as of June 30, 1930, Government's Exhibit 32 (248-250), shows cash on hand in the sum of $45,-334.37, Brandt's testimony is false and is inconsistent with his acts. This argument is made in the face of the uncontradicted testimony that the company borrowed money with which to pay dividends in June, 1930 (330), dividends, which one of the appellants insisted had to be paid (330), and the records show that part of the money with which these dividends were paid was borrowed from one of the appellants (330).

Under this proposition appellants contend that the Court erred in sustaining an objection to the avowal made by appellants as a part of the cross-examination of Brandt (425). As the trial Court stated, the avowal might contain some matters which might be proper subject for cross-examination (427). We do not believe, however, that counsel can burden the Court and opposing counsel with the task of editing an avowal, striking therefrom all objectionable matter and leaving only unobjectionable matter. The avowal must be good in its entirety. If any part of it is bad, a proper objection should be sustained. Appellants' attention was called to this rule of evidence in the colloquy between Court and counsel (428).

An offer of proof must contain but one proposition and it must be specific and not general.

64 C. J. 128, Sec. 148.

The Court is not bound to separate the admissible

from the inadmissible but may reject it as a whole.
64 C. J. 131, Sec. 150.

Under this proposition and throughout their brief appellants contend that Brandt's testimony is not worthy of belief because, they say, he appropriated some of the funds of the company to his own use. This position is not supported by any evidence in the record. Statements of counsel, unsupported by competent testimony, do not constitute evidence or proof of a fact. As we have heretofore pointed out, even the statement (appellants' Exhibit "E" for identification) would not be proof of any fact except that the witness had made such a prior statement.

It would appear that appellants' efforts to discredit the witness Brandt's testimony in the minds of the jury were undertaken on the theory that, like the King who can do no wrong, a defendant can commit no error.

The entry in the books respecting the $5,000 advanced by the company to the Phoenix Packing Company, which appellants say was a fictitious entry and, therefore, so discredited the entire records and books that they should not have been used as a basis for any testimony, was, in fact, not a fictitious entry and did not change the financial status of the company and its profit and loss statement. The $5,000 was checked out of the company's funds, the check being payable to the Phoenix Packing Company (415). The charge on the books was made to the Kansas City unit of the Clarence Saunders Stores (416), with a reimbursement to be made later from that unit (416). The money was advanced to the packing company in order

to meet the requirements of the Corporation Commission on the sale of stock of that company (418). To the extent that the charge was entered against the Kansas City unit rather than the packing company, the entry was incorrect, but it was not fictitious.

Appellants do not advance any logical reason in support of Specification of Error 10, which is included under appellants' Proposition IV. The four checks offered in evidence (422-423), Exhibit "F" for identification, were checks drawn on the funds of the Phoenix Packing Company on deposit in The Valley Bank. How they could have any connection with the Saunders Company is not shown. The $5,000 advanced by the company to the packing company was deposited in the Citizens State Bank at Five Points and not in The Valley Bank (418). If the offer of the checks in evidence was for the purpose of showing that Brandt had embezzled the funds of any corporation, it would not be admissible, because, as we have heretofore pointed out, the only method of showing that a witness has committed a crime is by proof of conviction. We are content to submit this assigned error to the Court by reference to the checks themselves (422, 423).

We have not deemed it necessary to discuss the authorities cited by appellants under Proposition IV, which support the right of cross-examination. We are in full accord with such a principle. The right of cross-examination, however, does not carry with it the right to abrogate and violate those fundamental rules of evidence that have been in force in courts of the United States since the organization of our judicial system. The rights of litigants, as well as the rights of witnesses, demand that these rules be enforced.

V

MOTION FOR A DIRECTED VERDICT

The first point urged under this proposition is that there was no identification of the signature of M. Loveland to Exhibit 43, which is the letter set out in the first count of the indictment, the mailing of which is the offense charged. The record shows that M. Loveland was bookkeeper and stenographer in the employ of appellants (271). Some of the letters sent out by the Bond & Mortgage Company (appellants' corporation) were signed by her as Assistant Secretary (296, 392). Her signature was identified on exhibits in evidence (268). Exhibit 43 was one of a group of letters addressed to the witness Addie Driscoll, the group being marked Government's Exhibit 41 for identification. The letters were then given additional identification marks, 41-A, 41-B, etc. (274). These letters were then identified by Addie Driscoll as having been received by her through the mail (272-274).

Witness Brandt testified that he was familiar with M. Loveland's signature and that the first letter shown him of the group (Exhibit 41 for identification) was signed by Mrs. Loveland (268). A very significant fact which we wish to direct the Court's attention to in connection with Brandt's identification is that the first letter in the group introduced in evidence was Government's Exhibit 43, the indictment letter. The other letters of the group were introduced in evidence as Exhibits 44, 45, etc. All of which indicates that the signature of M. Loveland on Exhibit 43 was identified by Brandt, he having identified the signature of all of the letters of the group (Ex-

hibit 41 for identification) which were introduced in evidence, and the first letter introduced bore the signature of M. Loveland.

Any doubt of that fact is entirely removed when we take into consideration that Exhibit 43 was admitted in evidence without any objection being raised that the signature had not been identified (273). In Assignment of Error XIV (506, 507) no such ground is urged and in the Specification of Error 14 (Appellants' Brief, pp. 60-61), there is a similar lack of mention of any such ground. It is not until the argument under Proposition V, that appellants, by an ingenious reading of the record, urge that there was no identification of the signature. So we respectfully submit that the question of the identification of the signature is not properly before this Court.

There is another final and complete answer to this contention of appellants. There is no possible doubt about the identification of M. Loveland's signature on some of the exhibits offered and admitted in evidence (268). Exhibit 44, with her signature, was admitted in evidence without any objection being interposed by appellants (274). With Exhibit 44 in evidence, the question of the proof of the signature on Exhibit 43 and whether or not it was M. Loveland's, was for the jury, even if there had been no other identification. Evidence of the mailing of the indictment letter is amply supplied by the testimony of Margaret Romley (271), she having testified to the general custom in regard to the handling of the letters and circulars under the direction of appellant Gus Greenbaum, the contents of the letter itself, identified as one in reply

to one received by appellants' company from Mrs. Driscoll.

The mailing of a letter may be shown by the custom in the course of a man's private office and business.

Watlington v. *United States*, 233 Fed. 247.

Knickerbocker Life Ins. Co., v. *Pendleton*, 115 U. S. 339.

Evidence that appellants dominated the affairs of the company (the Greenbaum brothers and the Bond & Mortgage Company) and exercised control of its business and that letters were written on the stationery of the company, and seemingly from its place of business, is sufficient, together with other facts in the record, to justify the finding that the appellants caused such letter to be placed in the post office.

Levinson v. *United States*, 5 F. (2d) 567.

McIntyre v. *United States*, 49 F. (2d) 769.

Havener v. *United States*, 49 F. (2d) 196.

Cochran v. *United States*, 41 F. (2d) 193.

Part of appellants' argument in support of this proposition is based upon the alleged defect in the indictment. That question has been sufficiently discussed elsewhere in this brief. Appellants contend further, however, that the indictment charged that certain important events resulted from the acts of all the defendants, including appellants, and that there was no proof of appellants' participation in all of the acts and that other acts, such as selling the stock, were

charged against all of the defendants, and that the proof shows that defendant A. E. Sanders had no connection with the sale of stock. The same argument is advanced in connection with the allegations and proof regarding H. D. Sanders, a defendant named in the indictment. As a matter of fact, appellants did have something to do with the organization of the company and the securing of the franchise from Clarence Saunders, and A. E. Sanders had something to do with the sale of stock. As president of the company, he must have signed some of the certificates, and we know from the record that he signed some of the letters in evidence. We do not deem it necessary, however, to point out to the Court the record as to those matters. It is a well-known principle of law, as we have stated in our argument under Proposition I, that each one of the schemers need not participate in every act done in the furtherance of the scheme. In fact, he may not know what some of his partners are doing but he is bound by their acts.

Silkworth v. *United States*, 10 F. (2d) 711.

Schwartzberg v. *United States*, 241 Fed. 348.

Wilson v. *United States*, 190 Fed. 427.

The failure of the Government, as appellants' claim, to prove all of the allegations of the indictment, would not invalidate the verdict or judgment. All that is required is to prove enough facts to establish the necessary elements of the crime. We believe that in the discussion so far in this brief we have shown by the record abundant evidence of all the elements of the crime charged, and the guilt of appellants has been

proven beyond all reasonable doubt. That the Government alleged more than was necessary, cannot save appellants from the responsibility of the acts charged and proven.

Appellants' sale of stock resulted in receipt by the company of approximately $800,000. Appellants, in their brief (pp. 20, 211) offer the fact of the large amount of money procured through their efforts as a mitigating circumstance, if not a complete defense. It is the first case that has come to our attention where the receipt of a large sum of money, obtained through false representations and the use of the mails, has been urged in mitigation of a crime.

In addition to the company stock sold, appellants sold much of their own stock, including 20,000 shares given them by A. E. Sanders, and these sales were made during the time when stock sales, ostensibly for the benefit of the company, were being made (392, 403). In concluding their argument under this proposition, appellants contend that the letter of April 9, 1930 (Exhibit 43), was not mailed in furtherance of the alleged scheme. The letter on its face shows it was in response to an inquiry by Mrs. Driscoll, who had purchased stock through appellants. It would undoubtedly have been embarrassing to appellants in April, 1930, to have a dissatisfied customer. At that time and during the succeeding months they were not only selling stock of the company but were selling their privately owned stock in the company. If the suspicions of Mrs. Driscoll, or any other stockholder, became aroused and there was any unfavorable publicity, it would have seriously interfered with the plans of appellants and partly, at least, defeated their scheme.

It was necessary to keep Mrs. Driscoll and all other stockholders, as well as prospective purchasers, from discovering the truth. The letter of April 9, 1930, in which the selling price of the stock was placed at $10.-00 per share, would have a tendency to lull into a sense of security one who had purchased stock in the company at $5.00 or $7.50 per share.

Preeman v. *United States*, 244 Fed. 1, 9.

Farmer v. *United States*, 223 Fed. 903, 910.

Newingham v. *United States*, 4 F. (2d) 490.

Lewis v. *United States*, 38 F. (2d) 406.

We quote from the opinion in the Lewis case, supra:

> "It is contended that this letter was not mailed in pursuance of the scheme to defraud alleged in the indictment. It was used for the transmission of information in relation thereto, and contained a part of the proceeds of the transaction with A. M. Epstein and his associates, brought about by some of the fraudulent representations set out in the indictment. The letter was mailed as a part of the fraudulent scheme, and to aid in effecting it. The notes were still being offered to the public, and the tendency of the letter was to lull the recipient into a false sense of security as to the value of the notes he had received. This was sufficient to bring the letter under the condemnation of the statute." (38 F. (2d) 415).

The contention of appellants under this proposition and throughout the brief that there was a failure

to prove the charge was based upon the assumption that much of the evidence introduced was inadmissible and should be disregarded. We feel a determination of the admissibility of the evidence based upon the books and records, as well as a determination of the question of variance raised by Proposition VI, will be determinative of the question of the sufficiency of the evidence. We will, therefore, pretermit any discussion or review of the evidence as a whole at this time.

VI

VARIANCE BETWEEN ALLEGATIONS AND PROOF

Appellants contend under this proposition that there was a variance between the allegations in the indictment and the proof, and that the Government attempted to prove two distinct schemes. The law applicable to this proposition has been discussed and the authorities cited in our discussion of Proposition I. We will, therefore, confine our discussion here to the evidence relied upon by appellants in support of Proposition VI and briefly restate the principles of law hereinbefore more fully set out.

The fact that there was not sufficient evidence to connect the defendant H. D. Sanders and his acts with the scheme charged, does not make the conviction of appellants defective or erroneous. It frequently happens in cases of this nature that one or more of the defendants are discharged by the Court for lack of evidence or acquitted by the jury because of insufficient proof and, at the same time, conviction of other defendants named in the same indictment upheld. We

disagree with appellants in their statement that the principle of law applicable to conspiracy cases, to the effect that it is not necessary for such defendant to take part in every phase of the venture, does not apply to a case of this kind.

49 C. J. 1209 (Sec. 236).

Silkworth v. *United States*, 10 F. (2d) 711.

Schwartzberg v. *United States*, 241 Fed. 348.

Wilson v. *United States*, 190 Fed. 427.

The so-called two adventures mentioned by appellants, namely, the sale of stock in the company and securing the exchange of stock of that company for stock in another company, could, as we said under Proposition I, easily be part of the original scheme. The fact, that incidental to defrauding the original purchasers, the company itself, or others, were also defrauded would not necessarily act as a purification of the original fraud intended.

It must be remembered, in connection with the U-Save Holding Corporation, and the other corporations with which appellants are not connected by the evidence, that A. E. Sanders was a party defendant and on trial when the exhibits concerning these corporations were introduced in evidence. In order to make the transactions in connection with these companies and H. D. Sanders a part of the original scheme, it would not be necessary to prove that all of the associates of H. D. Sanders and A. E. Sanders were parties to the original scheme. Such associates might

have innocently taken part in these transactions.

It is clear from the principles laid down in the case of *Terry* v. *United States*, 7 F. (2d) 28, cited by appellants, that the only one who could gain any advantage by a failure of proof as to the activities of H. D. Sanders would be H. D. Sanders and not these appellants.

The case of *DeLuca* v. *United States*, 299 Fed. 741, cited by appellants, involved the consolidation of two indictments charging separate acts and separate offenses. Obviously, the case is not applicable.

In the case of *McElroy* v. *United States*, 164 U. S. 76, cited by appellants, the parties were not the same and the offenses were in no wise parts of the same transaction and were dependent upon evidence of a different set of facts. Neither a conspiracy nor a scheme to defraud was charged. The crimes joined were murder of two different persons and the burning of a dwelling house.

We have studiously but vainly endeavored to find any applicability to the case at bar of the quotation from *Tinsley* v. *United States*, 43 F. (2d) 890, found on page 206 of appellants' brief, although we concede that the principle announced is sound law. In the Tinsley case, the conviction of two of the defendants under the conspiracy count was upheld in spite of the fact that evidence was introduced concerning the activities of other defendants, which activities the Court held were no part of the conspiracy charged and the judgment as to those defendants was reversed. Had H. D. Sanders been convicted on the evidence in this

case, we apprehend that this Court would likewise reverse the judgment as to him but affirm it as to appellants, whose connection with the scheme charged has been established by the evidence. We submit the Tinsley case in support of the Government's position in this case.

We also adopt the case of *Wyatt* v. *United States*, 23 F. (2d) 791, cited by appellants, as authority in support of appellants' conviction. We quote from the opinion on page 792:

> "But they maintain that the evidence failed to prove that all had breathed together or conspired to do the elaborately extended and lengthily continued network of acts evidencing the conspiracy charged. Certainly we shall not review the conduct of all of the individuals, accused and not accused, who were implicated in this running or revolving combination; nor shall we trace their relations one to another in their various and devious transactions, for that can only be done be repeating the greater part of many hundred pages of the record. We shall merely announce our conclusions as to whether, on the only substantial question raised by the writ of error, there is evidence that sustains the convictions."

The Court then proceeded to sustain the conviction of those defendants as to whom there was evidence connecting them with the scheme.

The case of *Marcante* v. *United States*, 49 F. (2d) 156, cited by appellants, supports the Government's

position on many of the issues in this case. We quote from the opinion on page 156:

> "The trial court overruled a demurrer to the indictment, and this ruling is assigned as error. The trial court was right. There is no doubt that there can be a conspiracy to violate the liquor laws in a dozen different localities; such a conspiracy may be a continuing one; actors may drop out, and others drop in; the details of operation may change from time to time; the members need not know each other or the part played by others; a member need not know all the details of the plan or the operation; he must, however, know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose."

Again, at page 158:

> "It is elemental that the Government need not prove all the allegations."

The reversal in the Marcante case, supra, is based on the ground that the conspiracy alleged was not proven. The proof disclosed two conspiracies by two different groups. In the present case there was proof of one conspiracy.

VII

FAILURE TO PROVE A SCHEME

In support of this proposition appellants quote from the testimony of A. E. Sanders, on pages 210 and 211 of their brief. The answers to the questions there

quoted are not evidence of any fact, but mere conclusions of law on the part of the witness. Counsel in propounding these questions left to the witness the determination of what constitutes fraud on the public and what constitutes unlawful acts. We are confident that the Court will find ample evidence in the record to prove the scheme charged and to prove actions on the part of appellants in furtherance of such scheme. Much of this evidence has been repeated and referred to in this brief and we will not repeat it here. The other statement taken from the record (349), and quoted on page 211 of appellants' brief, is merely a statement made by the witness to his counsel and counsel for appellants in a conference while he was still on trial and before his plea of nolle contendere. It is not evidence given at the trial and is not proof of the truth of the facts therein stated, but is merely evidence that he made such a prior statement.

It is under this proposition that appellants advance the theory that because of the large amount of money obtained by them as a result of their false representations, they should not have been convicted. Much of the rest of the argument under this proposition is devoted to the success and progress of the company and the reasons for its ultimate failure, all of which is immaterial and beside the issue. The success or failure of the enterprise has no bearing on the guilt or innocence of appellants. Fraudulent representations and the use of the United States mails are prohibited in connection with successful enterprises, as well as unsuccessful ones.

Foshay v. *United States*, 68 F. (2d) 205.

We quote from this case:

"No amount of honest belief that corporate enterprises will ultimately make money for stockholders will excuse false representations sent through mail to obtain money for such enterprises."

Foster v. *United States*, 178 Fed. 165, 172.

Knickerbocker Merchandise Co. v. *United States*, 13 F. (2d) 544, 546.

VIII

EXCEPTION TO INSTRUCTION

This proposition is based upon Assignment of Error XXVIII (523) and Specification of Error 19 (Appellants' brief, pp. 65-66). Both the assignment of error and the specification of error enlarged the grounds upon which the exception was taken to the instruction. The only ground mentioned in the exception was that the phrase "substantial practices" was not defined (481). There was no mention of the phrase "within the lines of the charge" and, of course, under the rules of Court and the authorities, the trial Court's attention must be directly called to the alleged error in the charge, in order that the Court be given the opportunity to make any necessary corrections.

Rule 30, United States District Court for the District of Arizona.

Baldwin v. *United States*, 72 F. (2d) 810 (C. C. A. 9).

Allis v. *United States*, 155 U. S. 117, 122.

We quote Rule 30, supra:

"Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court before the jury have retired that such party excepts to the same, specifying by numbers of paragraphs, or in any other convenient manner, the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to, and specifying the grounds of such exceptions. As to the charge given by the court of its own motion the grounds of exception shall be specific."

We quote from the Allis case, supra:

" 'However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception.' *Harvey* v. *Tyler*, 2 Wall. 328, 339. 'If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed.' *Mouler* v. *Am. Life Ins. Co.*, 111 U. S. 335,

337." (155 U. S. 122).

Wiborg v. *United States*, 163 U. S. 632.

The Court's charge in this case was comprehensive and eminently fair to appellants. The jury was told that it must be proven beyond a reasonable doubt that the "defendants" were cooperating in the scheme or artifice (462) and that before any "defendant" could be held responsible for the acts of any other person connected with the scheme, the act of such other person must be shown to have been in furtherance or execution of the scheme. The jury was also carefully instructed in regard to the fact that H. D. Sanders and A. E. Sanders were not on trial and that it was the guilt or innocence of appellants the jury was called upon to determine (465). The claim by appellants' that the word "defendants" used in the instruction was not limited to appellants, the only ones on trial, is hypertechnical. We cannot conceive that the jury could have been misled or confused. No exception to the use of the word "defendants" was taken. It would not have been error to have instructed the jury that the defendants on trial would be bound by acts of defendants not on trial, where such defendants not on trial were shown by the evidence to have been parties to the scheme. This would apply particularly to the acts of A. E. Sanders.

IX

ERROR CHARGED IN INSTRUCTION

There was no exception taken to the instruction upon which this proposition is based (481), and the

statement following Assignment of Error XXVIII (524), to the effect that appellants duly excepted to such instruction on the ground that it was "prejudicial, unnecessary and not justified by the record", is not supported by the record. No exception whatever was taken to this instruction.

It was clearly within the power and discretion of the Court to give the instruction. Appellants wander from the record to state that this instruction was tendered by an over-zealous prosecutor. We must necessarily follow them off the record and deny requesting the instruction. The illustration used by the Court was apt and clearly made. The evidence shows the cupidity of the victims of appellants' scheme. It was this cupidity and the eagerness for large returns on the part of the public which aided appellants in their scheme and knowledge on the part of appellants of the existence of such cupidity which induced and urged them to undertake it.

CONCLUSION

We believe that the undisputed evidence in this case conclusively shows that appellants instigated the scheme which started with the organization of the company. From that time on their activities were continuous. They took part in securing the franchise from Clarence Saunders. They exclusively handled the sale of the stock of the company. Practically all of the letters and circulars concerning sale of stock was prepared in their office and was sent out over their signatures, or the stamped signature of A. E. Sanders, affixed in their office. They are, therefore, directly responsible for the misrepresentations alleged and

proven. They knew the condition of the company and also were aware of the payment of dividends out of capital, one of the appellants loaning part of the money for the purpose of making one dividend payment and insisting that the dividend must be paid. The evidence of the use of the mails by the mailing of the indictment letter is uncontradicted.

In the face of this record, the jury could not have consistently returned any verdict other than that of guilty. The well-known rule that when substantial justice has been done, the verdict will not be disturbed where the errors claimed are technical rather than substantial, applies with particular force to this case. Appellants have had a fair and impartial trial. Substantial justice has been done and the judgment should be affirmed.

Respectfully submitted,

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REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

In the short time allowed we are, of course, unable to fully reply to the Government's brief in this case, and, indeed, an examination of that brief indicates that on many points no reply is necessary, as we have thoroughly covered all the points in issue in our opening brief. However, inasmuch as counsel for the Government have misconstrued the record concerning the identification, or lack of identification, of the Addie Driscoll letter (Government's Exhibit 43 in Evidence), we feel that it is our duty to remove any confusion there may be in the Court's mind arising from the argument advanced by counsel for the Government in their brief concerning said exhibit.

* Where figures only appear in parentheses, in this brief, they refer to pages in the printed Transcript of Record.

We will also touch briefly on one or two of the other points attempted to be answered in the Government's brief.

THE INDICTMENT LETTER, GOVERNMENT'S EXHIBIT 41-U FOR IDENTIFICATION, ADMITTED IN EVIDENCE, OVER OBJECTION, AS GOVERNMENT'S EXHIBIT 43, WAS NOT IDENTIFIED AND, THEREFORE, THERE IS NO PROOF THAT THE DEFENDANTS MAILED, OR CAUSED TO BE MAILED, SAID EXHIBIT

As we understand it, counsel for the Government, after arguing that the signature was identified by witness Brandt, tacitly admits that there was no identification of the signature on Government's exhibit 43 by saying in effect that there was no proper objection raised in the court below. How can counsel say this in view of the record? When the document was offered in the evidence the following objection was made, as shown by the Transcript of Record, pages 272 and 273:

> "Mr. HOWE: We object to the Government's offer in evidence upon the ground and for the reason that it does not connect nor tend to connect the defendants Greenbaum or any one of them with the offense charged and shows on its face that said defendants were not a party either to the mailing of the letter, or the letter which elicited that response, incompetent, irrelevant and immaterial as far as the defendants Greenbaum or any one of them are concerned.

MR. REIN: May I add the further suggestion there is no adequate proof of mailing by the defendants Greenbaum.

THE COURT: Objection overruled.

MR. REIN: Exception."

The very issue was the mailing of the letter and the objection that it did not connect nor tend to connect the Greenbaums with the offense charged and that it showed on its face that the Greenbaums were not parties either to the mailing of the letter or the letter which elicited that response would seem to be all sufficient; but in order that there could be no misunderstanding the further objection was made that there was no adequate proof of the mailing of the letter by the Greenbaums. This is more than sufficient. That the appellants persisted in their objections goes without saying, for at the conclusion of the Govenment's case the appellants moved for a directed verdict, and one of the grounds was that the Government had failed to prove beyond a reasonable doubt that the letter of April 9, 1930, was mailed or caused to be mailed by the Greenbaums, or either of them, and the same identical motion was made at the close of all the evidence. (Subdivision 18, page 454, Transcript of Record.)

And again, at the conclusion of the Court's instructions, Mr. Whitney, one of counsel for appellants, said:

"I believe in your charge, Your Honor stated generally that the use of the United States mails

to defraud was the gist of the offense, which is true as an abstract proposition, *but we think it should be restricted to the letter of April* 9, 1930, *which is the only count in the indictment.*"
And the Court then said:

"I thought that it was. Without proof of the mailing of the letter of April 9, 1930, to Mrs. Driscoll, there could be no conviction in this case." (Transcript of Record 481).

In their assignments of error (Assignment IV, Subdivision C, page 492, Transcript of Record) the appellants again set out that

"there was no competent or substantial evidence to show that the defendants-appellants mailed or caused to be mailed the letter set forth in count one of the Indictment."

And in Assignment of Error No. XIV, shown on page 506 of the Transcript of Record, it is pointed out that the lower court erred in admitting in evidence Government's Exhibit 43, and one of the reasons assigned is,

"that there was no adequate proof that the defendants-appellants mailed or caused to be mailed said letter."

In the Specification of Errors Relied Upon the appellants again, in Specification of Error No. 2, raised the question that there was no competent substantial evidence to show appellants mailed or caused to be mailed the letter set forth in Count One of the Indictment. (See Brief of Appellants, Page 47).

And again, by Specification of Error numbered 14, the question is presented that Government's Exhibit 43 was not properly admitted in evidence, (See Brief of Appellants, Pages 60 and 61)

> "for the reason that there was no adequate proof that defendants-appellants mailed or caused to be mailed said letter."

Aside from this, appellants moved to strike said exhibit (449).

In view of this, how can the Government contend that this question was not properly raised in the court below and persisted in throughout the entire proceedings?

As stated in our opening brief (beginning with the last paragraph on page 192) there was no identification whatsoever of the signature to the letter, the mailing of which is alleged in the first count of the indictment to be the offense with which the appellants were charged and upon which offense only they could be convicted. This letter to Addie Driscoll, which is dated April 9, 1930, was admitted in evidence as Government's Exhibit 43 and, as stated in our opening brief, was originally marked Government's Exhibit 41-U for identification and was part of a batch of letters originally marked Government's Exhibit 41 for identification. The Clerk marked this batch of letters, upon the instruction of the Court, as 41-A, 41-B, 41-C, etc. (Transcript of Record, Page 270).

Counsel for the Government, in their brief, say:

"Witness Brandt testified that he was familiar with M. Loveland's signature and that the first letter was signed by Mrs. Loveland (268). A very significant fact which we wish to direct the Court's attention to in connection with Brandt's identification is that the first letter in the group introduced in evidence was Government's Exhibit 43, the indictment letter. The other letters of the group were introduced in evidence as Exhibits 44, 45, etc. All of which indicates that the signature of M. Loveland on Exhibit 43 was identified by Brandt, he having identified the signature of all of the letters of the group (Exhibit 41 for identification) which were introduced in evidence, and the first letter introduced bore the signature of M. Loveland." (See page 43 of the Government's Brief).

If counsel intends to convey the impression to the Court that the first letter in Exhibit 41 for identification was 41-U, which was eventually introduced in evidence as Exhibit 43, they must have inadvertently misread the record. Brandt stated, at page 268 of the Transcript of Record:

"I am familiar with the signature of Mrs. Loveland, A. E. Sanders and Gus Greenbaum. The first letter of Government's Exhibit 41 for identification is signed by Mrs. Loveland. The second letter by A. E. Sanders."

Now then, turning to page 270 of the Transcript of Record, it will be noted that the court instructed the clerk to take Government's Exhibit 41 for identification and mark each letter 41-A, 41-B, etc. Bear in

mind that the disputed letter was marked 41-U for identification. Now then, turning to page 274 of the Transcript of Record, the witness Driscoll stated:

> "I received Government's Exhibit 41-A for identification (the first letter of Government's Exhibit 41 for identification) through the mails at Douglas, Arizona. It was enclosed in a stamped envelope addressed to me."

Government's Exhibit 41-A for identification was received in evidence and marked Government's Exhibit 44, which is a letter dated June 18, 1929, signed by M. Loveland. The next letter of the group of Government's Exhibit 41 for identification, identified by Brandt, was 41-B for identification, which was introduced as Government's Exhibit 45. This letter Brandt states was signed by A. E. Sanders, and the letter will be found on page 275 of the Transcript of Record, showing that it was dated July 16, 1929, and signed by A. E. Sanders.

Government's Exhibit 41-U for identification was nowhere identified, and the record does not in any way bear out the contention of counsel for the Government that the first letter of Exhibit 41 for identification was marked 41-U for identification, or that the first letter of that group was introduced first. It will be noted that none of the exhibits marked for identification, that is, 41-A, 41-B, etc., were introduced in evidence until 41-U was offered and received. After 41-U for identification was offered and received, then the District Attorney offered the other letters in their order. The District Attorney, knowing that 41-U was the indictment letter probably thought

that he would introduce that first and then follow with the other letters in the group.

A critical examination of the evidence given by all the witnesses concerning the mailing of letters in this case discloses that at no time, either by direct or circumstantial evidence, was it shown that the defendants mailed or caused to be mailed Government's Exhibit 43. Certainly there was no direct evidence of that fact. The letter does not purport to be signed by one of the appellants, but it purports to be signed "Bond and Mortgage Corporation, by M. Loveland, Assistant Secretary" and apparently was written on the letterhead of "Bond and Mortgage Corporation". There was evidence to the effect that M. Loveland was employed by, and worked for, the appellants, *but there is no evidence that she signed this particular letter.* Therefore the one important link in the chain of circumstances is missing, i. e. the identification of the signature on the letter. The first testimony introduced by the Government for the purpose of identifying the various letters and circulars contained in Government's Exhibit 41 for identification was by Tom H. Brandt, and is shown on pages 268, 269 and 270 of the Transcript of Record. Of the letters that were admitted in evidence (and included in 41 for identification) Brandt identified the signatures on the following:

Government's Exhibit 44, signed by M. Loveland (274);

Government's Exhibit 45, signed by A. E. Sanders (275);

Government's Exhibit 46, signed by E. B. Horne (275);

Government's Exhibit 47, signed by M. Loveland (276);

Government's Exhibit 48, signed with the rubber stamp facsimile of A. E. Sanders' signature (276);

Government's Exhibit 49, signed with the rubber stamp facsimile of A. E. Sanders' signature (277);

Government's Exhibit 50, signed with the rubber stamp facsimile of A. E. Sanders' signature (278);

Government's Exhibit 51, signed with the rubber stamp facsimile of A. E. Sanders' signature (278);

Government's Exhibit 52, signed by K. C. Van Atta (279);

Government's Exhibit 53, signed by mimeographed signature of A. E. Sanders (280);

Government's Exhibit 59, signed by Tom H. Brandt (280);

Government's Exhibit 54, signed by G. C. Partee (281, 288);

Government's Exhibit 56, signed by mimeographed signature of H. D. Sanders and G. C. Partee (289).

Nowhere can it be found in the testimony of Brandt that this letter, Government's Exhibit 43, vital to the Government's case, was identified. Mrs. Driscoll's testimony on page 272 of the Transcript of Record is as follows:

> "Referring to Government's Exhibit 41-U for identification, consisting of a letter and envelope, I will say that I have seen it before at the Douglas Post Office, when I took it out of the mail. I received this letter through the United States mails. I am pretty sure that it was enclosed in that envelope, *but wouldn't swear it is the same envelope.* I turned the letter and envelope over to the Post Office Inspector Means. The letter was in this envelope, or one identical with it, *as far as the address and letterhead is concerned*, when I received it."

On page 291 of the Transcript of Record, Mrs. Driscoll further testified concerning this letter:

> "I received the letter of April 9, 1930, marked Government's Exhibit 43, in evidence; I received other correspondence from the Bond and Mortgage Corporation or the Arizona Clarence Saunders Stores, Inc."

So much for the attempted identification of Government's Exhibit 43.

We will now examine the record concerning the custom of appellants concerning mail matter that was sent out by them in the course of their business dealings. Margaret Romley (page 271 of the Transcript of Record) testified that she was employed by the Greenbaums in March of 1929 for a period of about seven or eight months. This would indicate that if she was employed for the full eight months that *she ceased her employment in November* 1929. *The letter, the identification of which is disputed, was not mailed until*

April 9, 1930, *according to the evidence, or some five months after her employment ceased,* so whatever the witness Romley has to say cannot in any way affect this particular letter, as the date of the letter is too remote from the time she ceased her employment with the appellants. However, she testified that,

> "I worked in their office in the Security Building, mailing out *circulars* and *form letters.* Employed in the office besides myself were Mrs. Loveland, Miss Fitts, Mrs. Galland and Mrs. Bellas. Mrs. Loveland was bookkeeper and stenographer. The general custom in regard to handling letters and circulars was to go through the files and get the names, and we addressed the envelopes for the circulars, folded them, and sent them out. This was done under the direction of Mr. Gus Greenbaum. *We had two or three different form letters that were sent out. Mr. Gus Greenbaum's and Mrs. Loveland's signatures were on some of them.* Refering to Government's Exhibit 41-L for identification, being the letter dated July 1st, 1930, it was signed with the facsimile of A. E. Sanders, made with a rubber stamp. I placed *some* of the letters that were sent out in the mail by either taking them to the post office or putting them down the mail chute in the Security Building."

On cross-examination witness Romley testified:

> "I have no recollection of just what or when any particular form of these circulars went out. The rubber stamp I spoke of was kept in plain view on one of the desks in the office."

Where is there any testimony here that would even remotely identify the signature of M. Loveland on the letter in question? It would seem from the testimony of witness Romley that she only referred to form letters and circulars, because she says: "We had two or three different form letters that were sent out. Mr. Gus Greenbaums' and Mrs. Loveland's signature were on some of them." By no stretch of the imagination could it be said that the letter set forth in count one of the Indictment, the identification of which is now in issue, was a form letter or circular.

Adverting to another witness produced for the purpose of showing custom — his testimony likewise fails to identify the letter in issue. This witness, Sam W. Hamilton, (Transcript of Record, beginning on page 341 and ending on page 344) testified in connection with Gus Greenbaum as follows:

> "I called on him for the purpose of soliciting business in the line of printing and engraving. I took an order for printing some letter-heads and envelopes, and some bonds."

Thereupon, Government's Exhibit 85 and 86 were received in evidence. Exhibit 85 being a blank letter-head of Arizona Clarence Saunders Stores, 701 Security Building, Phoenix, with envelope attached. Exhibit 86 was a blank letter-head of Bond and Mortgage Corporation, Security Building, Phoenix, Arizona, with envelope attached.

We find, therefore, that the letter addressed to Addie Driscoll, and which is the letter upon which the indictment is based and founded, was marked by the

Clerk "41-U for Identification". There was no identification whatever of the signature attached to such letter as being that of 'M. Loveland". Neither witness Brandt, nor any other witness, was asked to identify the signature on Government's Exhibit 41-U for Identification, but nevertheles it was offered and, over the objection of the defendants, admitted as Government's Exhibit 43. No matter that this letter, Exhibit 43, was received by Addie Driscoll through the mail; no matter that it was on the letterhead of the Bond and Mortgage Corporation; no matter what the custom in the office of such company may have been as to the mailing of letters, neverthless, as to this particular letter, there was no proof that the signature attached thereto was that of M. Loveland, or of any of these defendants, nor that it was signed by the authority of any of these defendants; nor that the defendants caused this letter to be signed or mailed.

The Government attempts to meet this entire want of identification of signature by saying that the jury had the right to compare signatures. That is, the United States Attorney argues that because the signature of M. Loveland was identified on Exhibit 44, and some other letters in Exhibit 41 for identification, they could compare the last mentioned exhibits with 43 for the purpose of determining the authenticity of the signature on 43. That may be true if 43 was properly admitted in evidence, *but such is not the case.* A jury cannot compare the signature of an instrument properly admitted of record with some instrument not before them, such as something they read in the newspaper or see in a photograph. Neither can it be said that the members of a jury can compare the signature of an instrument properly admitted with one improp-

erly admitted. The instrument improperly admitted is not deemed to be a part of the record which the jury can examine. This Exhibit 43 should not have been admitted in evidence and should not have been exhibited to the jury until the signature of M. Loveland was identified, and when admitted in the absence of such identification it is a nullity and can be used for no purpose whatever, either for that of comparison or otherwise.

The following cases we believe will convince this Honorable Court that Government's Exhibit 43 was, over our objection, wrongfully received in evidence because the signature on the exhibit was not identified and hence there was no showing by circumstantial evidence that the defendants mailed or caused to be mailed that exhibit within the meaning of Section 338, Title 18, U. S. C. A. In this connection see the following cases:

Beck v. *United States*, (C. C. A. 8), 33 Fed. (2d) 107, 111;

Freeman v. *United States*, (C. C. A. 3), 20 Fed. (2d) 748, 750;

United States v. *Baker*, (C. C. A. 2), 50 Fed. (2d) 122, 124;

Brady v. *United States*, (C. C. A. 8), 24 Fed. (2d) 399, 403;

Davis v. *United States*, (C. C. A. 3), 63 Fed. (2d) 545;

Berliner v. *United States*, (C. C. A. 3), 41 Fed. (2d) 221, 222;

Cohen v. *United States*, (C. C. A. 3), 50 Fed. (2d) 819, 821;

Underwood v. *United States*, (C. C. A. 6), 267 Fed. 412;

The above are all the cases we have been able to find involving the use of the United States mails in furtherance of a scheme to defraud that consider the point now under consideration. In some of these cases the facts are distinguishable from the case now being considered but all of them are in principle the same insofar as the law is concerned.

In *Beck* v. *United States*, (C. C. A. 8), 33 Fed. (2d) 107, the Court said, at page 111:

> "That the mails were used is clear. That the defendant Beck is bound if Barrett used the mails in the ordinary course is not open to serious dispute. The law does not now require an intent to use the mails as part of the scheme, as formerly. It is sufficient if they are used. Beck placed Barrett in the position of general manager of the corporation, leaving to him the direct management of the business while Beck primarily looked after his own business. Beck employed and paid stenographers, which shows a contemplated use of the mails. *Aside from the fact that the letters purport to bear Barrett's signature, the record is barren of proof that he signed them or mailed them. This is insufficient to bind either Barrett or Beck.*" (Emphasis ours).

In *Freeman* v. *United States*, (C. C. A. 3), 20 Fed. (2d) 748, (cited in our opening brief at page 193) the Court said, at page 750:

> "The basic element of the offense is the placing of a letter in the United States mail for the purpose of executing such a scheme. That is what makes it a federal offense. It is defined in the statute, must be alleged in the indictment, and must be proved. How? The Government says that it may be proved by the presumption arising from the postmark, * * * or, under the general rule that a postmark is prima facie evidence, that the envelope had been mailed, * * * That, concededly, is the rule in civil cases; but it leaves unanswered the question — *vital in criminal cases* — who mailed it? The statute imputes the crime to "whoever * * * shall * * * place or cause to be placed any letter in the mails, * * * " and the indictment here charged that the three defendants did that thing. That charge, we hold, must be proved by evidence. The evidence need not be direct; that is, it need not be that the defendants were seen mailing the letter; it may be circumstantial, that is, evidence of acts or doings, or business custom of the defendants, from which their act of mailing or their act which caused the letter to be mailed may reasonably and lawfully be inferred. There are many cases of this kind. * * *; but in each case there is some act or group of acts on which the fact that the accused mailed the letter or caused it to be mailed can be hinged.

No case has been called to our attention and none has been discovered by our independent re-

search where conviction has been sustained when there is no evidence, direct or circumstantial, that the accused mailed the letter. In the case at bar there is ample evidence of the receipt of the three letters through the mail, but the only circumstance that connects Freeman with mailing them, or any of them, *is that the enclosures bore his signature and that a month or more before the letters were received Freeman had, in one instance, been asked for a statement of his company* * * * Moreover, we think the fact that Freeman signed the statement is not proof that he mailed it. *As to Rosin and Paskow, there is no evidence connecting them with mailing the statement other than it was written on their company's stationery and enclosed in the company's envelope.*

On this issue, we are constrained to reverse the judgment as to the three defendants and direct that they be given a new trial in harmony with this opinion." (Emphasis ours).

In *United States* v. *Baker*, et al., (C. C. A. 2), 50 Fed. (2d) 122, the Court, at page 124, said:

"If the guilt of an accused under the mail fraud statute requires no more proof of the mailing of a letter than proof that it was written in one city and received in another, the task of a federal prosecutor in such a case is much simpler than had hitherto been supposed, * * * and 18 U. S. C. A. Sec. 338, would become by construction not a mail fraud but a letter fraud statute, lacking in the essential basis of federal jurisdiction which the use of the mail provides. To avoid such a perversion

of the statute, *in the guise of passing upon the weight of evidence, it is necessary to insist upon real proof, circumstantial or direct, that, beyond a reasonable doubt, the mail was used.*

Judgment reversed."

In *Brady* v. *United States*, (C. C. A. 8), 24 Fed. (2d) 399, the Court said, at page 403:

"There is no direct evidence that defendants wrote the letters or that they deposited them in the post office directed to Mergen with postage prepaid, or that they otherwise caused them to be delivered to Mergen through the mails. * * * *The genuineness of the purported signatures to the letters does not appear to have been directly established.* The fact that the defendants caused such letters to be delivered to Mergen through the post office at Beloit, Kan., must be inferred, if at all, from the fact that the letters purport to have been written either by McClintock or by Brady, that the letters are addressed to Mergen at Beloit, Kan., and that Mergen testified he received such letters through the mail. To sustain the judgment, we must hold that the jury were warranted in presuming from this evidence, and this evidence alone: First, that the letters were inclosed in envelopes addressed to Mergen at Beloit, Kan.; second, that the defendants caused the letters to be duly stamped and mailed; and, third, that the post office at Beloit, Kan., received them and delivered them to Mergen. To do this, we would have to permit presumption to be built upon presumption. From the fact that the letters contained in themselves the address of L. A. Mergen, Beloit, Kan.,

the presumption would have to be drawn that they were enveloped, properly stamped, and addressed to Mergen at Beloit, Kan. From this presumption, the presumption would have to be raised that the defendant Brady caused them to be mailed, so addressed, and from the last presumption the presumption would have to be drawn that the post office establishment delivered them at Beloit, Kan., to Mergen. It is well settled that presumptions cannot be based on presumptions * * * We conclude that the evidence was insufficient to support the verdicts of guilty. See *Freeman* v. *U. S.* (C. C. A. 3) 20 F. (2d) 748." (Emphasis ours).

In *Davis* v. *United States*, (C. C. A. 3) 63 Fed. (2d) 545, the Court said, at page 546:

"Thus the sole question is whether that was enough evidence on which to submit the issue of mailing. This court * * * ruled in effect that the charge of mailing, an essential element of the offense, particularly important because it is also the jurisdictional element, must be proved, and that evidence that a letter was received through the mail by one person is not proof that it had been mailed by the defendant. In other words, to justify submission of the question of mailing by the defendant there must be evidence of that fact, direct or circumstantial. The learned trial judge, knowing these cases, did not disregard them but submitted the case on a charge which correctly and adequately stated the law, *in the belief, however, that 'there is some evidence for this jury to consider as to the defendant having mailed that statement.'* Of course, if there were some evidence

legally substantial, some circumstance from which an inference of mailing by the defendant could permissibly be drawn, there was no error, yet we are constrained to say that we cannot find any.

The government points to eight facts as culpable circumstances, all of which, we find, on examination, are unrelated to the offense and, when subjected to the legal test, are as consistent with the hypothesis that the defendant did not mail the statement as they are consistent with the government's contention that he did mail it. A conviction on these circumstances alone would have required the trial judge to set it aside. The inescapable conclusion is that in this record there is no evidence that the defendant mailed the statement or caused it to be mailed other than the fact that the Board of Trade received it through the mail. That, standing alone, and standing, as it does, wholly apart from any evidential circumstances, is under the authorities not enough.

The judgment of sentence is reversed." (Emphasis ours).

The Government in support of its position infers that appellants dominated the affairs of the company and exercised control of its business, and that letters written on the stationery of the company, and *seemingly* from its place of business, is sufficient to justify the finding that appellants caused such letter to be placed in the post office. In support of its position the Government cites:

Levinson v. *United States*, 5 Fed. (2d) 567;

McIntyre v. *United States*, 49 Fed. (2d) 769;

Havener v. *United States*, 49 Fed. (2d) 196;

Cochran v. *United States*, 41 Fed. (2d) 193.

(See page 45 of the Government's brief).

The *Levinson* case, above cited, insofar as the mailing of the letter was concerned, was based on the question of venue. The question was: "Where was the letter mailed from?" It is not in point with the case at bar, and some of the *dicta* therein is clearly at variance with the many cases cited by us in this brief.

In the *McIntyre* case the question was — were the letters mailed within the district where the proceeding was had. The court calls attention to the fact that that was the only question involved in the case— not that the defendant mailed the letter, but where did he mail it. This is another case involving venue. The opinion states that the mail matter in issue was signed by the defendant.

In the *Cochran* case the facts are very much stronger than in the case at bar. In that case the letters were mailed on the letterhead of the concerns involved in the scheme. They were shown to have been written by the employees in the office. Some of them were signed personally by some of the defendants and it was shown that they were all written under the direction of those in charge of the stock selling campaign. They apparently were all form letters, and were mailed to and received by the various addressees named. It is very significant in this case that the

court stated "*When offered in evidence they were not objected to that there was not sufficient proof that they had been mailed*" and the court states further that "*It is quite apparent that the claim now made to the effect that the evidence of mailing is insufficient is an afterthought.*" So this case is not in point, as with the appellants in the instant case the question of mailing was not an afterthought but a thought that they had all through the proceedings, as will be shown by the record.

In the *Havener* case the question raised by counsel for the defendant was that there was no evidence to show that the defendant caused the letter, alleged in the indictment, to be delivered by registered mail, according to the direction thereon, *for the purpose of executing such scheme to defraud*, and the court held that the use of the mails in furtherance of a scheme may be established by circumstantial evidence, and the circumstances in that case were that the letter was received by Biles by registered mail, through the post office at Hill City, Kansas. It was addressed to him. It referred to prior transactions between the defendant and Biles; it purported to have been written by the defendant; it enclosed a note purported to have been executed by the defendant. Biles returned the note to the defendant. *When Biles demanded payment from the defendant of the note forwarded in with such letter defendant did not deny that it was his note but stated he could not pay it because he did not have the money.* Said the Court:

> "*This was a tacit admission that defendant had forwarded such note and letter through the United States mails.* It is improbable that anyone but de-

fendant and Biles were sufficiently acquainted with the prior transactions to have written such a letter. *These circumstances*, in our judgment warranted the jury in finding that the defendant forwarded the letter by registered mail directed to Biles at Hill City, Kansas." (Emphasis ours).

In the case at bar the signature on Exhibit 43 was not in anywise identified and there are no circumstances legally sufficient to either admit the letter in evidence or to permit the jury to infer that the appellants mailed or caused to be mailed said letter. This in our opinion is reversible error.

INDICTMENT

We feel satisfied that counsel for the Government have not met the argument in our opening brief concerning the insufficiency of the indictment so that we will not burden the court with any further argument on that point, except that we desire to call the Court's attention to a case cited by counsel, on page 14 of their brief, to-wit, *Worthington* v. *United States*, 64 Fed. (2d) 936. Counsel say: "*This is one of the latest* decision on this point" (duplicity). They fail to call the Court's attention to the statement in the case that, "*If the charge sets forth more than one scheme to defraud, it is duplicitous.*" That is what we are contending here — that there is more than one scheme to defraud set forth in the indictment in the instant case.

ADMISSION IN EVIDENCE OF STATEMENTS PREPARED FROM BOOKS OF ACCOUNT, BEING EXHIBITS 89, 90 AND 91

On this feature of the case we feel that counsel for the Government have wholly failed to meet the argument advanced by us in our opening brief (pages 126 to 166, inclusive). Counsel in their brief, at page 19, say:

> "Appellants' contention is that the books and records underlying these exhibits would not be admissible against appellants and that, therefore, the statements themselves were not admissible. We believe that the determination of the admissibility of the books and records will determine the merits of appellants' Proposition II.
>
> On page 129 of their brief, appellants set forth the grounds upon which Proposition II is based. Appellants' contention that, because they had no connection with the books and had no control over them, the books would be hearsay as to appellants, has no support in the authorities cited by appellants and we have found none supporting that theory.
>
> The Government, having produced evidence of representations made by appellants relative to the financial status of the corporation, its management, earnings, profits and future prospects, it then became incumbent upon the Government to prove the falsity of one or all of these representations. * * * "

In order that there be no confusion we desire to say that if there was a proper foundation laid for the admission in evidence of the books and records underlying Exhibits 89, 90 and 91, and the books had been properly identified, and shown to be the original records, and to be correct, then they would not be hearsay as to defendants; but that is not the situation here, as an examination of the record will disclose and as pointed out in our opening brief. Counsel for the Government admitted that it was incumbent upon the Government to prove the falsity of the representations as to the financial condition of the company, and that is just what we have been contending all along. The appellants, having had no control over the books and records of the company, of course, unless a proper foundation had been laid for the introduction of the books, they could in nowise be used against the appellants. We doubt very much if the evidence would have been sufficient to have admitted the books against A. E. Sanders, the head of the enterprise and the individual who was the operating head of the business. But, be that as it may, the appellants herein were not operating the business of the stores company. They were simply selling stock for the purpose of financing the stores company and, therefore, the showing made upon which to base exhibits 89, 90 and 91 was not sufficient as to them. It must be remembered that counsel for the Government admitted in the court below that these books, (Government's Exhibits 34 to 39 for Identification, inclusive), *were but summaries of the original entry books* (370). It must be admitted by opposing counsel that all of the books and records were not in court and that such of the books and records as were in court were incomplete, indeed in part false. It is upon these books, that Exhibits 89, 90 and 91 are founded. We again respect-

fully submit that these exhibits were improperly admitted in evidence.

ADMISSION IN EVIDENCE OF GOVERNMENT'S EXHIBITS 109 AND 110

Counsel for the Government, on page 34 of their brief, argue that the cases we cited are not in point and claim that these exhibits were admissible in evidence as Government records. They cite *Heike* v. *United States*, 192 Fed. 83; and *White* v. *United States*, 164 U. S. 100. As stated in our opening brief, these cases were relied upon by the Government in the court below. We have fully analyzed those cases in our opening brief, at pages 176 and 177, and no more will be said about those cases.

However, it might be well to inquire whether or not these income tax cards are Government records. Counsel failed to cite any law making them public records, nor authorizing or requiring their filing or keeping as a public record. We have been unable to find any regulation of the Treasury Department requiring the keeping of these income tax cards, which are merely indexes, and inquiry at the office of the Collector of Internal Revenue at Phoenix discloses that these cards are kept, not under any regulation of the Treasury Department but under instructions relating to detail office procedural matters connected with the Bureau of Internal Revenue. It is well settled that,

> "Where there is no law making a certain paper a public record, nor authorizing or requiring its filing or keeping, it is not admissible as a public record; the filing and recording of such a paper adds

nothing to its validity and is not proof of its execution so as to authorize its admission in evidence." 16 *Corpus Juris*, 738, 739; Par. 1519.

Assuming, however, for the sake of argument that these income tax cards are public records, which we contend they are not, they are at best memoranda taken from the original income tax returns and are not the best evidence.

Counsel have failed, we believe, to understand one of the points raised in connectnon with the admission of these exhibits. Section 661, Title 28, U. S. C. A., as amended June 19, 1934, provides that,

"Copies of any books, records, papers, or other documents in any of the executive departments, * * * * * shall be admitted in evidence equally with the originals thereof, *when duly authenticated under the seal of such department*, * * * * * *".

It would seem to us that the only way you could admit in evidence any of the documents mentioned in Section 661, supra, would be to either admit the original, *or an authenticated copy thereof, under the seal of the department having the custody thereof.* Transcripts from the records of the executive departments, when authenticated by the seal of the department, are evidence both at common law and by statute. Compare:

Block v. *United States*, 7 Ct. Cl. 406.

"The mode of authentication, as prescribed by law as transcripts from the executive department,

must be strictly pursued to make them evidence." *United States* v. *Harrill*, Fed. Cas. No. 15,310.

"A copy of a letter on the letterhead of the Bureau of Yards and Docks, and signed by one designating himself as Assistant to the Bureau, was not competent as a copy of the files of the Bureau, where it was not authenticated as required by statute." *Arnold* v. *Thompson & Spear Co.* 279 Fed. 307.

Of course it would be like carrying coals to New Castle to say that the regulations of the Treasury Department did not have the force and effect of law. See *Boske, etc.* v. *Comingore*, 177 U. S. 459, 44 Ed. 846.

This last mentioned case has recently been cited with approval by this Court in *Ex Parte Sackett*, 74 Fed. (2d) 922, 923, 924 (Advance Sheets of March 18, 1935). In the *Sackett* case this Court said:

"In *Boske* v. *Comingore*, supra, the Supreme Court of the United States sustained a rule of the Treasury Department with relation to the custody of documents, etc., similar to the rule adopted by the Attorney General with reference to the records of his department. It was there held that such a regulation was not inconsistent with law, was valid *and binding upon the courts*, and in effect held that under such a regulation the head of the department became the exclusive custodian of the records. In that regard the court said:

'In our opinion the Secretary (of the Treasury),

under the regulations as to the custody, use, and preservation of the records, papers, and property appertaining to the business of his department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.'" (Emphasis ours).

Counsel for the Government have not, we believe, comprehended the effect of *Corliss* v. *United States*, (C. C. A. 8), 7 Fed. (2d) 455, quoted from on page 172 of our opening brief.

The error in admitting these two exhibits to our minds is patent.

RESTRICTING THE CROSS-EXAMINATION OF WITNESS BRANDT

What we have said on our opening brief concerning this question is, we believe, sufficient to demonstrate to the Court that there was error committed in restricting our cross-examination of that witness. On page 42 of the Government's brief counsel say:

> "We have not deemed it necessary to discuss the authorities cited by appellants * * * * which support the right of cross-examination. We are in full accord with such a principle."

Indeed, we hardly blame counsel for not attempting to discuss those authorities, and earnestly insist that

they have full application to the point under consideration.

MOTION FOR DIRECTED VERDICT

We have previously argued the points with reference to the attempted identification of the Addie Driscoll letter (Government's Exhibit 43), and have not the time to properly take up other questions sought to be answered by the Government concerning the motion for a directed verdict. We have, we believe, fully presented the questions involved in our opening brief. It might be worth noting, however, that counsel for the Government have failed to discuss the point of law set forth in *Mandelbaum* v. *Goodyear Tire & Rubber Co.* (C. C. A. 8) 6 Fed. (2d) 818, which is discussed on pages 158, 159 and 160 of our opening brief. This case was cited in support of our contention that Exhibits 90 and 91 showed a condition of the stores company too remote from the commission of the offense, to-wit, April 9, 1930. Exhibits 90 and 91 purport to show a condition of the stores company in September of 1930, and Exhibit 89, a condition existing December of 1929. These conditions, we contend, are too remote from the date of the commission of the alleged offense.

CONCLUSION

We have not the time to discuss the question of variance and the instructions. Suffice it to say that we are relying upon our opening brief and upon the argument that will be made at the hearing of this case.

We again respectfully submit that the case should be reversed.

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
LAWRENCE L. HOWE,
THEODORE E. REIN,
Attorneys for Appellants.

We again respectfully submit that the case should be reversed.

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For the Ninth District

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Appellants,

—vs—

UNITED STATES OF AMERICA,
Appellee.

ADDITIONAL REPLY BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Arizona

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No. 7695

ADDITIONAL REPLY BRIEF OF APPELLANTS

Appreciating the privilege, granted by the Court, of filing this Additional Reply Brief, appellants shall endeavor to restrict the ensuing suggestions to the shortest possible space. The brief of appellee, however, contains so many erroneous statements of, and conclusions from, the evidence and misconceptions of the law, that the full protection of appellants' interests demands that appellee's brief be not permitted to go unchallenged.

It is said that appellants' statement of facts could be characterized as an argument but, as the Court will perceive, when it comes to consider the briefs and the

transcript of the evidence each statement made by appellants is completely and distinctly supported by the record. The full statement of the evidence and procedure below so persuasively indicates the strength of appellants' position that the errors committed by the trial court are apparent without argument. Probably the attempt to designate appellants' statement of the facts as argument is an old-fashioned method of gaining tolerance for appellee's statement, which is indubitably contentious.

Some of appellee's argumentative statements are: "We consider this of minor importance"; and, "we are confident that the evidence preponderates so overwhelmingly on the side of the Government"; and "the Court is well aware of the fact that items such as 'accounts receivable' * * * might not be worth ten cents on the dollar"; and the defendants "should have introduced some evidence" as well as many other plain attempts at persuasion in what is supposed to be a statement of the facts.

It is not only incorrect but unfair to state as a fact that one of appellants, preliminary to the organization of the Stores Corporation, accompanied A. E. Sanders to Tennessee when the Saunders franchise was obtained, when appellee's own witness, A. E. Sanders, positively testified that his counsel, Mr. Bird, was representing him (Sanders) and not appellants in the incorporation proceedings (346). The testimony of A. E. Sanders should not be forgotten, moroever, where, at a crucial point he testified on direct examination that one of appellants suggested the Arizona enterprise *and went with him to procure the Saunders license*, but on cross-examination said he didn't remember whether

this appellant went with him to Memphis or not (352).

Because of one remark of this Court on oral argument appellants respectfully direct the Court's attention to the fact that this chain store enterprise created in Arizona was, according to the Government's evidence, conceived in the utmost good faith, (349; 354) and that, as the result of appellants' activities between $800,000 and $900,000 in cash was delivered to the corporation by appellants, they drawing no salaries or other compensation from the company, paying their own expenses and dealing with the corporation and A. E. Sanders at arm's length. The events touching the delivery to them of some of Sanders' personally owned stock have been considered in appellants' opening brief (20).

In response to another inquiry of the Court as to whether or not appellants were the managers, or in control of the company, it may be said, without fear of contradiction, that the evidence discloses that appellants had nothing whatsoever to do with its business operation, with its management, with its property, with its funds or with its records. The enterprise was no "cloak" to cover stock sales operations. The corporation commenced business, made leases, opened stores, acquired warehouses, equipment, trucks and stocks of goods, and by the middle of 1930 had twenty-one to twenty-five retail stores in operation according to a letter written by Government witness Partee (Exhibit 54, Tr. 281, 287). According to this same letter, the company was then doing a business of over $2,000,000 a year. The company had warehouses in Phoenix, Tucson and Nogales. A complete discussion of the facts appears in appellants' opening brief, to which the

Court's attention is respectfully directed (pp. 10-44; 191-201; 201-217).

ARGUMENT

I

THE SUFFICIENCY OF THE INDICTMENT VAGUENESS AND UNCERTAINTY

No case has been found, and certainly none has been cited in appellee's brief, in which an indictment remotely resembling that at bar has been approved.

The defectiveness of the indictment was pointed out in appellants' original brief in two main divisions:

(1) — Its vagueness and uncertainty;

(2) — Its duplicitous nature.

The indictment charges in express language that the defendants devised and intended to devise a scheme to defraud *and* to obtain money by false pretenses made to induce various persons to purchase stock and debentures of the corporation (3, 7). This is expressly admitted by appellee (Appellee's Brief pp. 11-12).

No good purpose is served by the argument that the mailing of the letter is the gist of the offense and that the scheme need not be pleaded with that certainty which is required in pleading the use of the mails. The offense complained by Sec. 215 of the Revised Statutes does not contemplate, of course, the mere use of the mails but a use of the mails *in furtherance of a scheme*

to defraud. The whole phrase must be read without pause to make sense. If there be no use of the mails a fraudulent scheme is not cognizable under Federal law and if no fradulent scheme exists the use of the mails does not constitute an offense.

Even appellee's own case, *Brady* v. *United States*, 24 Fed. (2nd) 399, (Appellee's Brief 9) recognizes in its opinion that it is necessary "to charge the scheme with such particularity as will enable the accused to know what is intended and to apprise him of what he will be required to meet on the trial". The District Attorney neglects to observe the further part of the rule as stated in *Fontana* v. *United States*, 262 Fed. 283 (C. C. A. 8) (Appellants' Br. 95) that it is not only essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge he must meet, but it is also necessary that the scheme be pleaded "*so particularly as to enable him to avail himself of a conviction or acquital*". This complete statement of the rule is recognized in *Mathews* v. *United States*, 15 Fed. (2nd) 139, and other cases cited by appellee (Appellee's Br. 6). The latter portion of the rule neglected by the District Attorney, is vital to the inquiry concerning the sufficiency of the indictment.

As was contended by appellants in their opening brief, the indictment is vague and uncertain because, (1) it charges the offense of devising the scheme prior to the *dates* of the mailing of letters in the several counts of the indictment, and (2) it includes, within its allegations, averments of events having to do with the defendant H. D. Sanders, the Piggly Wiggly Hold-

ing Corporation, the U-Save Holding Corporation, the acquisition of control and the disposition of assets of the stores company, wihout any averment connecting these pleaded assertions with the scheme to defraud in the sale of stock and debentures by false pretenses. As to these allegations, in addition to rendering the indictment uncertain, they render it, also, guilty of duplicity, as to which a few words will be said in reply to the Government's argument upon the point of duplity.

As has been heretofore argued, the indictment was drawn upon the theory of a preconceived plan embracing seventeen counts, the allegations describing the scheme all being thrown into one omnibus first count and intended to be incorporated by reference in the subsequent counts of the indictment. It must be remembered that the so-called gist of the offense is the use of the mails by the letter of April 9, 1930 (13). On that date, therefore, the offense is alleged to have been committed and must be regarded as completed.

With the mailing of the letter charged as a violation of the statute the scheme, *so far as the consideration of the offense is concerned*, becomes a closed incident. Any changes in the alleged unlawful plan or in the fulfillment thereof by its devisers cannot be considered as a part of that scheme in furtherance of which the letter, charged as constituting the offense, was mailed. While subsequent events may have a retroactive bearing upon the question of intent, they cannot, in the nature of things, be said to constitute a part of an original scheme which must, with logical inevitability be completely devised, and intended to be

devised, prior to, or simultaneously with, the particular misuse of the mails for which punishment is demanded.

An inconceivably broad latitude was assumed, however, when, after sixteen counts of the indictment had been eliminated by demurrer, the Court, nevertheless, permitted the Government to prove any scheme which it might undertake to establish on November 23, 1928, the date of incorporation, and prior to any one of the sixteen dates on which letters and other literature are alleged as having been sent through the mails in the seventeen counts of the indictment, thus making it possible to prove a scheme to defraud at any day before February 19, 1931 (42). If, therefore, a scheme to defraud was attempted to be proved as being devised as late as February 18, 1931, then, under the Government's theory of the indictment, there would be such a scheme as would render criminal the mailing of the letter on April 9, 1930, ten months earlier. This restatement is believed to be helpful in view of the Court's question, during the oral argument, asking when appellants had severed their connection with the company and with the sale of its securities.

Under the evidence the separation of appellants from the enterprise occurred prior to the advent of the defendant H. D. Sanders, who was in the full swing of his operations by October 6, 1930 (281); Government witness A. E. Sanders testifying, "I don't think the Greenbaums had any connection whatever with the last two mentioned companies; (Piggly Wiggly corporation and U-Save corporation). These corporations were organized by my brother, H. D. Sanders." At another point Mr. Sanders stated that appellants

stopped selling the stock and debentures of the company "along in June or July, 1930" (355).

The defendants under the trial court's conception of the indictment could be called upon to defend against any evidence appertaining to any scheme which the Government might elect to attempt to prove even after appellants had no further connection with the enterprise. From a factual standpoint this is exactly what happened on the trial as is demonstrated by the record (42-44-50-56), and argued in appellants' opening brief at page 89, et seq.

Cases are cited by appellee such as *Chew* v. *United* States, 9 Fed. (2nd) 348 (Appellee's Br. 7) to the effect that the exact date of the formation of the scheme need not be alleged. Here, however, *many dates are alleged*, the District Attorney thus electing to abandon the general videlicit. In the *Chew* case, moreover, all counts remained in the indictment and the Court considered it as a whole. To the same effect are the other cases cited by appellee such as *Heney* v. *United States*, 44 Fed. (2nd) 134 (Appellee's Br. 7).

A careful examination of the authorities cited by appellee gives rise to the suspicion that many of the decisions used were not thoroughly read or that they were taken from *Corpus Juris* or some other general reference work. Such, for example, is *Munch* v. *United States*, 24 Fed. (2nd) 518 (Appellee's Br. 7), which is cited to sustain or justify an indictment which pleads that the scheme was devised prior to a number of dates. There is not a word to this effect in the opinion.

Appellants have no grave objection to charging the alleged scheme in patchwork parts, their objection resting upon the ground that events should not be pleaded as a part of an alleged illegal scheme which do not, and which cannot, by their inherent nature, belong to the puzzle.

Appellee cites *Brady* v. *United States*, 24 Fed. (2nd) 399 (Appellee's Br. 9), but it will be found upon examination of the decision that, while the indictment there under consideration charged the scheme in parts, there was no objection thereto and consequently no occasion for the Court either to approve or disapprove the practice.

The cases relied upon by appellee to the effect that the Government need not be specific in its allegation of the *date* at which the scheme was devised are not in point. The marked difference between such cases and the case at bar is that in the instant case too much was alleged and too much proved. In effect, the prosecutor had the benefit of the seventeen counts of the indictment even though demurrers had been sustained to sixteen of them, with the same effect, and as inimical to appellants' position, except as to the extent of the possible penalty, as if all of the seventen counts had remained, unassailed, in the indictment.

DUPLICITY

The brief of appellee contains hardly a pretense of an answer to appellants' brief upon the question of duplicity.

As has been said, the crime charged consists of two

elements (1) the devising of the scheme and (2) the mailing of one letter in furtherance thereof. What is the scheme charged in the indictment as fraudulent? Appellee answers this question at page 11 of its brief as follows:

> "There is but one scheme charged in the indictment and that was the scheme to obtain money and property by the sale of stock and debenture bonds of the Clarence Saunders Stores and its successors by false and fraudulent pretenses, representations and promises."

So also states the indictment (Tr. 2, 7).

The essence, therefore, of the scheme in furtherance of which the mails were used is, necessarily, the *making of false pretenses in the sale of the original stock and debentures* of the company. The indictment alleges the incorporation of the company, its capitalization, the permit to sell, the procuring of the Saunders License Agreement, the organization of the Bond and Mortgage Company, the issuance of common stock to Sanders, the payment of dividends out of capital and other events and transactions providing the background upon which is superimposed the following vital allegation:

> "It was further a part of said scheme and artifice and in furtherance thereof, that the defendants, for the purpose of inducing the persons to be defrauded to part with their money and property *in the purchase of common and preferred stock and the debenture bonds of said Clarence Saunders Stores, Inc.* and its successors would and did un-

lawfully * * * make false pretenses * * * to the persons to be defrauded * * * ".

Then follows fourteen specifications of misrepresentation after which the mailing of the letter of April 9, 1931—called the indictment letter—(Exhibit 43) is set forth.

But the prosecution was not satisfied with the allegation of a single scheme. The indictment went on and charged a set of facts having no conceivable bearing upon a scheme to sell the securities of the stores company by the use of false pretenses. As was pointed out in appellants' original brief, (p. 105) the indictment charged, as a part of the scheme, that the defendant H. D. Sanders and his associates organized the Piggly Wiggly Holding Corporation, changed its name to U-Save Holding Corporation which engaged in business in California, and that the U-Save Holding Corporation acquired control of the stock of the Stores Company, took charge of its assets and removed $100,000 of its merchandise, wrongfully, from Arizona to California. Certainly these events could not be a part of a scheme to defraud by false pretenses in the sale of stock and debentures of the corporation under consideration. These charges might constitute fraud against the corporation or its existing stockholders, but they possess no conceivable bearing upon a scheme to sell the stock of the Clarence Saunders Stores, Inc. under that or any other name which this corporation subsequently adopted.

The District Attorney, however, attempts no real justification for the insertion of these averments but, instead, openly admitted in this Court that the indictment was not in the best of form. Lame indeed is the

attempted explanation. At page 11 of appellee's brief it is said that "The gaining control of the company by the U-Save Holding Corporation and the removal of merchandise *might,* as claimed, be a fraud on stockholders but that would not prevent it from also being a part of the original scheme to defraud and obtain money or property by false representations." This inconclusive statement is not followed by any explanation as to how or in what possible manner such events could constitute a part of the original scheme. The silence of the prosecutor, it is submitted, is due to the utterly inexplicable character of these allegations.

After asserting that these averments might be part of the scheme the District Attorney contradictorally asserts that they simply constitute the means of carrying out the scheme (Appellee's Brief, page 12). The allegations, however, are pleaded not as a means but as a part of the scheme (6). How could the organization of the U-Save Holding Corporation be a means to the end of obtaining money from persons solicited to purchase stock of the original corporation? How could the acquisition of control and of the assets of the Stores Company constitute a means to that end? How could the attempt to trade the stock of the U-Save Holding Corporation for the stock of the company be a means of inducing persons *to purchase stock of the original corporation* by means of false pretenses? These questions must forever go unanswered by the District Attorney. The acts charged are different. The actors are different. The parties against whom the alleged illegal actions are directed are different and accordingly, the scheme is different.

When demurrers were sustained to the last sixteen

counts there was left a first count which was drafted in contemplation of an indictment based upon evidence submitted to the grand jury under which the seventeen counts were returned and the first count, so pleaded as to constitute part of the ensuing counts remained inescapably defective.

These allegations cannot be regarded as surplusage. Deliberately phrased sentences, nay, whole paragraphs, of an indictment charged as part of the scheme cannot be disregarded for a further reason, perhaps not suggested in appellants' original brief. It must be distinctly noted *that these averments are followed by still further charges coupling them with allegations of false pretenses made in connection with the H. D. Sanders events.* For the purpose of this argument the Court's attention is again drawn to the indictment charging that the defendants, in furtherance of the scheme, *for the purpose of inducing the persons to be defrauded to part with their money in the purchase of stock and debentures* of the company, would and did make false representations. (7). If the Court will now examine paragraph 10 of the specifications of misrepresentation (10) it will see, as one of the false pretenses alleged, the following: "*Exchanging your investment from United Sanders Stores, Inc.* to *U-Save Holding Corporation, gives you a better investment than you had before, even at the time you made your original purchase.*" (10). Thus it becomes immediately apparent that the H. D. Sanders and U-Save Holding Corporation allegations, coupled with the allegations of false pretenses specifically applicable thereto, cannot by any process of reason be disregarded as surplusage. And when it appears that evidence was offered and received in substantiation of this feature of

the indictment this Court will perceive that not only did the Government *plead* two distinct schemes but also attempted to *prove* them. Scheme number 1 consisted of alleged false representations in the original sale of stock. Scheme number 2 consisted of false representations in connection with the U-Save Holding Corporation and the attempt to trade its stock for the stock of the Stores Company. The conclusion is, therefore, inescapable, that these incongruous allegations were deliberately inserted, deliberately attempted to be proved and deliberately submitted to the jury.

Therefore, the allegations of the indictment here under attack, constituting as they do a separate scheme or device, rendered the appellants amenable to trial therefor, notwithstanding conviction or acquittal on the scheme to sell the original stock by allegedly false pretenses.

All of the cases cited by appellee contemplate a single scheme and reveal that no matter what methods were used by the different defendants or whether or not some knew of the activities of others or regardless of the time when the various defendants joined or separated from the criminal enterprise, *all worked to a common end, i. e., the devising of a single scheme and the culmination of a single purpose.*

In appellants' opening brief it is demonstrated that the District Attorney cannot now abandon these cancerous allegations because he elected to put in evidence, not only one, but six pieces of documentary proof. These were Exhibits 6 (213), 13 (219), 53 (289), 54 (281), 56 (289) and 64 (297).

It ill behooves counsel for the Government now to say that the indictment is not duplicitous because these allegations can be disregarded. They did not disregard them when submitting the case to the grand jury and they did not disregard them upon the trial but, instead, welded them into the case by the offer and receipt of evidence. It should be remembered that the Government's own evidence disclosed that in October, 1930, H. D. Sanders, the unapprehended defendant not only took charge of the corporation but removed all of its books to Los Angeles (258) and that, to repeat, with the appearance of H. D. Sanders, appellants' connection with the enterprise ceased. (Tr. 350).

During the oral argument Judge Wilbur inquired of the United States attorney whether the indictment in the instant case was similar to the indictment in the case of *Shreve et al* v. *United States*, No. 7460 now pending upon appeal in this Court. The indictment in the instant case is almost a replica of the first indictment in the Shreve case. The first indictment of the Shreve case was attacked on the ground of its duplicity, vagueness and uncertainty and was, as before stated, similar to the indictment in the instant case. If the Court will examine the first Shreve indictment in connection with the indictment in the present case it will see that both were probably drawn by the same United States Attorney. The present United States Attorney, following the case of *Arnold* v. *United States*, 7 Fed. (2d) 867, abandoned the first Shreve indictment to which a demurrer was eventually sustained and in resubmitting the case to the Grand Jury attempted to present an indictment identical in form with the indictment mentioned in the Arnold case, supra, *which distinctly separates the schemes*. There was no attempt

to join a scheme to defraud and one to obtain money by false pretenses.

The present United States District Attorney perceived the error in the first Shreve indictment and set forth the separate schemes in separate counts of the indictment and followed each separate scheme with the letters sent in pursuance of that particular scheme.

The Court will note that in the second indictment, drawn in the *Shreve* case (No. 7460), now pending upon appeal in this Court, the present District Attorney drafted an indictment in twelve counts, — the twelfth count being based upon an alleged conspiracy. The other eleven counts are based upon a violation of Section 338, Title 18, U. S. C. A. The first count attempts to describe "a scheme and artifice for obtaining money * * * by means of false pretenses, representations and promises, * * * ". This alleged scheme and artifice relates solely to the Security Building and Loan Association (see Volume 1 of the Transcript in No. 7460, pages 2 to 6 inclusive, for a description of the alleged scheme). Then follows counts 2 and 3 setting forth letters sent pursuant to the scheme attempted to be alleged in the first count of that indictment. Count 4 of the Shreve indictment also alleges "a scheme and artifice for obtaining money and property * * * by means of false pretenses, representations and promises, * * * ". Then follows the alleged scheme with reference to Century Investment Trust (see pages 16 to 20 of Volume 1, Transcript of the Record in No. 7460). Then follows counts 5, 6, 7, 8, 9, 10 and 11, setting forth letters sent pursuant to the scheme attempted to be alleged in count 4 of that indictment. It will be noted that in the second

Shreve indictment, the one now under consideration by this Court, the present District Attorney did not attempt to join "a scheme or artifice to defraud" *and* "a scheme and artifice for obtaining money by means of false pretenses, representations and promises" as was done by the former District Attorney in the first Shreve indictment, and as was done by the same District Attorney in the instant Greenbaum indictment, now pending upon appeal before this Honorable Court. In other words, in the second Shreve indictment the "schemes" were attempted to be separated, although the present District Attorney used very unfortunate language in the first count of the Shreve indictment by alleging:

> "that prior to the dates on which the several letters, statements and writings hereinafter referred to were placed and caused to be placed in the United States Post Office, *as hereinafter in the several counts of this indictment alleged*, * * * ". (Page 2, Vol. 1, Transcript of Record, in cause No. 7460).

thereby tying the first count of the indictment into all other counts *and into another distinct scheme* set forth in count 4 of that indictment. For a full discussion of the present Shreve indictment see argument beginning on page 129 of Opening Brief of Appellants in cause No. 7460, *Shreve et al.* v. *United States.*

Counsel for the Government say that they have found no case to sustain the proposition that the pleading of a scheme to defraud and to obtain money, etc. by fraudulent pretenses constitute the pleading of two schemes. They, apparently, did not search very

far because there are a number of authorities which hold that there is a difference between a scheme to defraud and a scheme to obtain money by means of false pretenses, representations and promises, for the reason that the statute upon which this indictment was drawn itself sets forth several schemes, any of which might be the basis of an indictment for the misuse of the mails.

We shall briefly analyze and discuss the history of the statute.

The indictment in the case at bar charges that the defendants devised and intended to devise "a scheme and artifice to defraud *and* to obtain money by means of false and fraudulent pretenses * * * ". That the scheme to defraud constitutes one basis for a prosecution under the mail fraud statute and the scheme for obtaining money and property under false pretenses constitute another basis for prosecution is demonstrated by the history of the statute and decisions thereunder.

The original Mail Fraud Statute, (Act of June 8, 1872, condemned "any scheme or artifice to defraud". This section was placed, without substantial change, in the Revised Statutes of the United States, 1873-4, as Sec. 5480. By the Act of March 2, 1889, the section was changed to read: "If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan * * * any counterfeit or spurious coin * * * ". Another amendment was passed by the Act of March 4, 1909, which enacted the criminal code and which included Sec. 215, and this is the provision under which the appellants were

indicted. The statute is now found to read: "Whoever having devised or intending to devise any scheme or artifice to defraud *or* for obtaining money or property by means of false or fraudulent pretenses * * * ".

In considering Sec. 5480 (the first amendment) it was held that the use of the disjunctive "or" showed an intention upon the part of Congress to bring within the "comprehension of the statute acts not theretofore criminal".

Lemon v. *United States*, 164 Fed. 953 (C. C. A. (8) 1904);

Culp v. *United States*, 82 Fed. 990 (C. C. A. (3) 1897).

That separate schemes are contemplated by the statute as it now exists and are indicated by the disjunctive word "or" is supported by the following decisions:

In *Busch* v. *United States*, 52 Fed. (2nd) 79 (C. C. A. 8, 1931), at page 82, the Court said:

> "It must be borne in mind that the charge here is not the use of the mails in carrying out a scheme to defraud, but the use of the mails in carrying out a fraudulent scheme to obtain money and property by means of false pretenses."

See also in this connection:

Moore v. United States, 2 Fed. (2d) 839 (C. C. A. 7, 1924);

Miller v. *United States*, 174 Fed. 35 (C. C. A. 7, 1909);

Beck v. *United States*, 33 Fed.(2d)107 (C. C. A. 8, 1929);

Beck v. *United States*, 145 Fed. 625, 626 (2nd Circuit);

McLendon v. *United States*, 2 Fed. (2d) 660 (6th Circuit);

Schwartzberg v. *United States*, 241 Fed. 348, 352 (2nd Circuit);

Emanuel v. *United States*, 196 Fed. 317;

United States v. *Smith*, 152 Fed. 542 (D. C.);

In *Moore* v. *United States*, 2 Fed. (2nd) 839, the Court said, at page 841:

> " * * * Of the holding by this court in *Miller* vs. *United States*, 174 Fed. 35, to the effect that counts of the indictment there under consideration contained 'no averment whatever respecting the value of such stock so to be exchanged for the $5,000, it may be said that the case arose under the law as it was before the amendment of March 4, 1909, * by which there was added, after the then existing clause, 'whoever, having devised or intending to devise any scheme or artifice to defraud,' the words, 'or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.' *The added words*

were evidently intended to enlarge the scope of the act, and to denounce and punish the use of the mails in execution not only of a scheme to defraud, but also of a scheme to obtain money or property by means of false representations or promises, and would in its terms include any scheme to obtain money from another by means of false pretenses, under circumstances where, but for the false pretenses or promises, the money or property would not have been parted with."

Scrutinize appellee's brief as it will, the Court will find not a single case and not a single reason having a remote approach to soundness offered in justification for this strange indictment and stranger proof.

II

THE ACCOUNTANTS' FINANCIAL STATEMENTS

Exhibits 89, 90 and 91

Appellee admits that the financial statements prepared by L. D. Null, (Exhibits 89, 90 and 91) are admissible only if the books and records upon which they are based are admissible (Appellants' Brief 19) and counsel for the Government direct their argument mainly to the point that these exhibits, and the books and records underlying them, do not constitute hearsay as to appellants. The objection as to hearsay was but one of the points urged to these exhibits. Appellants' objections were based upon the following additional grounds:

That all of the books and records upon which these exhibits were based were not even in Court.

That such of the books as were in Court were not properly identified.

That the books so presented in Court were themselves but summaries and not original entries (370).

That they were not identified at all for an important period of the corporation's existence.

That they were shown to be incorrect and to have been falsified by the man who identified them.

That no reasonable opportunity for examining the books for the purpose of checking the financial statements received in evidence as exhibits was afforded to appellants.

That these exhibits showed conditions at an end of the period without any indication of what the conditions were at the time of any alleged misrepresentation on, or prior to, the date of the offense, April 9, 1930 (Appellants' Br. 73).

At the outset it must be observed that Exhibits 89 and 90 (366, 374) were profit and loss statements for the year 1929 and for the first nine monthe of the year 1930, respectively, and that they were but part of a 207 page audit prepared months earlier for use in another matter entirely (360).

The witness Null not only said, as is stated in Ap-

pellee's brief at page 31, that in order "to verify, I would say certify, to that statement as to its true and correct condition, those books are not sufficient" (369), but he made another important admission, which appellee neglects to observe, as follows:

> *"I would not vouch for the accuracy of that balance sheet in the absence of the missing books, and in the absence of my experience in the first audit"* (383).

It is true that on rare occasion, the Court has permitted books of account in evidence, or expert statements prepared therefrom, even when the party against whom they are offered is not responsible for the entries. No case has gone to the extent, however, which the District Attorney requests the Court to go where the party against whom such books or such expert statements are offered is shown to have *no knowledge* of them. When the cases are examined we find no such situation as exists at bar. The authorities relied upon by appellee, *Butler* v. *United States*, 53 Fed. (2d) 800; *Barrett* v. *United States*, 33 Fed. (2) 115; *Stephens* v. *United States*, 41 Fed. (2d) 440, and cases of that ilk, were dissected in appellants' opening brief (see pages 143, 152 and 155). As was there said, the opinion in the *Barrett* case expressly states that, "to make the fact of receipts and disbursements material, *the Government, of course, must show that Barrett knew, at least in general, how the money was being spent.*" And the Court said further "if the books are necessary evidence they must be identified as required by the case of *Phillips* v. *United States*, (C. C. A.), 201 Fed. 259." The knowledge attributable to Barrett was

not to any degree attributable to appellants under the undisputed evidence.

In the *Stephens* case (Appellee's Br. 30) the 250 volumes of books and records were kept for convenience in the Court House and the auditors and bookkeepers, after examining them, testified positively that they were the books and records of the company and *all of such books and records of which they had any knowledge.*

In citing and quoting from *Butler* v. *United States*, 53 Fed. (2d) 800 (Appellee's Br. 20), counsel neglect to advise this Court that in that case every precaution was taken to assure the defendant of an opportunity to check the audit by furnishing him with a copy and "*by affording ample opportunity to cross-examine*". In the *Butler* case, moreover, the question of the sufficiency of the evidence was not even properly before the Court because, as was said in the opinion at page 806, "There was no objection * * * to the sufficiency of the identification. * * * no assignment of error being directed to the identification of the books, the bill of exceptions properly omited a colloquy between Court and counsel, which is set out verbatim in the brief, *and in which further identification was waived.*" (See Appellants' opening brief 155).

No adequate answer whatsoever is made to the other points attacking these exhibits and the books and records. That all of the books of original entry were not even present in Court is admitted. That those volumes which were upon the counsel table of the Government during the trial were but summaries was expressly admitted, nay, insisted upon, by counsel for the Gov-

ernment, Mr. Dougherty, of counsel for the United States, persisting in the statement that, "These books *are a summary*, your Honor, of the original entry books." (370).

Upon the oral argument the Court asked counsel for the Government what books were not in Court and the question was not answered. The answer appears, however, in the testimony of one of the Government witnesses, Mr. G. C. Partee, who stated (259), "These are not all the books that were kept by the company. This was a rather large concern and there are a lot of detail books." After stating that the stock ledgers and stock subscription journal were not present the witness continued; "there are other books that are not here, such as the accounts receivable and accounts payable and the detail record of the operation of the various stores, and things like that. I would call the operation of the Stores operating accounts used as detail information *and then at the end of the periods transferred to the general books, which are here.* No inventories are available here. *The monthly statements are not here.* * * * the detailed operating records were kept in permanent form, I would say. Monthly trial balances were made throughout the time I was with the company * * * there were several operating books in which operating accounts were kept which I could not name at the present time, *but they are not here.*"

Is such a condition of the record comparable to the situation as it existed, for example, in the *Stephens* case or the *Butler* case, supra?

Since there were monthly operating statements and

profit and loss statements and other records showing conditions as to profit or loss exactly for each month, and since these were not introduced in evidence or produced in Court, and no excuse offered for the failure so to do, and no reason suggested why they could not be produced, the presumption must be that the probative purport of such evidence, if produced, would be against the party who failed to produce it.

Missouri, K. & T. Ry. Co. v. *Elliott et al.* (C. C. A. 8) 102 Fed. 96 and cases cited on pages 102 and 103 (affirmed 184 U. S. 695 without opinion).

To appellants' point that there was no identification of the books whatever, even by Brandt, for the period commencing with the organization of the company to the date of Brandt's employment, a period some ten months in duration, appellee makes no answer worthy of consideration and such answer as is made does violence to the record. This contention appears on page 27 of appellee's brief where counsel, speaking of Brandt's testimony, said, "He further testified that, covering the period prior to his employment, he had made an audit balancing the books and that all entries were correct." What the witness actually said was that, "insofar as the entries in these books which I have identified are concerned, I would say that they are true and correct *insofar as my supervision extended.* The books were not in balance when I went there; we went back and audited them *and balanced them.*" (253).

This Court will quickly notice that he did not say, as appellee purports to quote him, that he had made an audit balancing the books *and that all original entries*

were correct after the balancing operation. Books may be balanced by many means and by many devices known to accountants. What missing items, if any, were charged off? What were charged to profit and loss? What did Brandt do when he said he audited or balanced the books? To say that he made and audit is to testify to an unadulterated conclusion.

In view of the grave misstatement of the evidence appearing in the brief for the Government, it is vital that Brandt's testimony on this point be further quoted *in haec verba* because, without identification, there can be no allusion to books and records and without books and records there can be no expert statements. Brandt testified (253):

> "Q. In so far as the original entries are concerned prior to your employment, you cannot say whether the books are correct or not?
>
> A. Through an audit yes.
>
> Q. Will you kindly listen to my question? I said as to the original entries made in the books of the corporation, you cannot say whether they were true or not, prior to your employment anyhow?
>
> A. *No.*"

It needs no further argument to demonstrate that the books were incomplete when Brandt arrived and that they were falsified while he was present.

The contention that appellants should have sought

for and audited the books of the Stores Corporation while they were awaiting trial, smacks of absurdity. How could appellants know the method or the extent of the proof which would be offered against them? More than that, however, it would be utterly inconsistent for appellants to attempt to sustain their innocence by introducing in evidence books and records which had been kept under the supervision of an embezzler who falsified them for the purpose of covering his own peculations committed one week after his appointment as treasurer of the company (248, 422).

As to exhibit 91, and to a somewhat lesser extent, as to exhibits 89 and 90, appellee makes an argument which, in a criminal case, is astounding. Exhibit 91 is a balance sheet as of September 30, 1930 which purports to show the condition of the company, as to its assets and liabilities, on that date. Bearing in mind that appellants are charged with devising a scheme to obtain money by false pretenses, this Court will at once see that the jury could have studied this exhibit exhaustively without being able to determine whether any representation alleged as having been made by appellants was true or false. The case of *Mandelbaum* v. *Goodyear Tire and Rubber Co.* (C. C. A. 8), 6 Fed. (2d) 818, cited in appellants' opening brief at page 158, is not only not discussed in appellee's brief, it is not even mentioned. There the Court rightly held that an expert statement made by accountants at the end of a period, and showing conditions on that date, furnished "*no proper index of the condition of the company six months before that time.*"

Sometimes enlightenment comes when a proposition is viewed in its reverse aspect. Assume that ap-

pellants, to disprove the alleged misrepresentations asserted as having been made at various times, some of them long prior to September, 1930, had offered in evidence a general balance sheet as of that date. Of course, it would be held that such a document would have no probative value. And, it is submitted, appellants could no more prove their innocence by showing a general condition six months after an alleged misrepresentation than the Government can prove the falsity of such a pretense by similar evidence. In other words, it would be impossible for appellants to prove that the corporation was in prosperous condition by showing a balance sheet as of September 30, 1930 in a general summary, specifying no dates, and it must necessarily be likewise impossible to prove that the company was not in a prosperous condition six months prior to the date of the balance sheet.

As has been said, the financial statements rested upon the books and records and the books and records were not introduced, were not all present, were not books of original entry, and were identified by a man whose undoubted vulnerability the Court refused appellants the opportunity to demonstrate.

III.

THE INADMISSIBILITY OF THE INCOME TAX CARDS.

(Exhibits 109 and 110).

Perhaps the most obvious and unprecedented, fatal, error committed by the trial Court was the admission of these exhibits. As has been heretofore stated their

purpose was to prove that the company had a loss for the year 1929 and also in the year 1930, as to which the return was filed by the receiver on October 3, 1932, and thus attempt is made to establish that the representations were false and that the payments of dividends were wrong. In other words, this was a method of establishing what the facts were at the time the representations were made and the dividends were paid—obviously a vital subject.

The original returns or duly certified copies thereof were available and, as has been heretofore sufficiently argued, the courts, over and over again have held that where such returns are admissible at all such only is the proper method of procuring their introduction in evidence. (Appellants' Brief 169-170).

The Court need only to look at these exhibits to perceive their character. Mr. Davidson, under whose testimony they were introduced, said only that they were kept in his office but that he had no knowledge of the entries or whether they were true or correct or even whether the purported totals were accurately copied from the returns. Without attempting to reargue Appellants' position in this connection, it is asserted merely that:

We do not know what the original return showed.

We do not know when the losses occurred.

We do not know why the losses occurred.

We do not know who prepared the returns.

We do not know who signed the returns.

We do not know from what sources they were compiled.

All these exhibits represent is a copied conclusion as to the correctness of which there was no testimony.

The Court should bear in mind that there was no showing whatsoever that appellants knew of the returns, or of their filing, or of their contents, and certain it is that the record positively discloses that they had nothing to do with the sources from which the original income tax returns must have been compiled.

Attempt is made to distinguish *Corliss v. U. S.* (C. C. A. 8), 7 Fed. (2d) 455, relied upon in appellants' opening brief (see page 171). In that case, as here, the indictment charged a violation of the mail fraud statute. There, as here, an attepmt was made to add to the evidence already introduced, copies of the income tax returns, three of which were admittedly identified as being correct and the originals of which had been signed by the defendants themselves.

The reason for the decision was founded upon the axiom that the copies of the returns, even though identified as correct copies, *did not constitute the best evidence of what they purported to show.* Appellants beg leave again to call to the Court's attention the language of the opinion; "Before they could be received in evidence, the fundamental rule required the Government to show that the original documents could not be produced. * * * the very nature of the papers proved that such a showing could not have been made * * *. A more flagrant violation of the best evidence rule

could hardly be conceived * * (and) *For this error the case must be reversed.*"

Whatever was the purpose of the introduction of these copies of the returns, the *Corliss* case demonstrates that the attempt to prove them by anything other than the best evidence thereof is improper.

The Government attempted to distinguish the Corliss case on the ground, also, that the exhibits under consideration were Government records and presumably correct. Correct, it may be asked, as to what? Certainly they could not be correct as to proof that the company suffered losses and equally certain they could not be introduced as an admission against interest because they were not admissions made by appellants or even statements of which appellants had any knowledge or connection. The preposterous argument is advanced that these exhibits were offered to show *the act of filing returns*, which returns showed losses. This contention is meaningless. The mere act of filing returns was a purposeless event but when there is added to the statement that the exhibits were filed for the purpose of showing returns *which exhibited losses*, the Government necessarily gave to the jury an ultimate conclusion of fact unsupported by underlying data, unsupported by the man who made them, and unsupported as to correctness.

There was no limitation in the offer of these exhibits in evidence. The jury were permitted to draw from them any conclusion they saw fit.

In *Shepard v. United States*, (290 U. S. 96) 78 L. Ed. 196, Judge Cardozo in rendering the opinion of the

court and in speaking of the proof of a dying declaration contended by the Government to have been offered merely to show a state of mind, said:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds * * * It is for ordinary minds and not for psycho-analysts, that our rules of evidence are framed. They have their source very often in questions of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out * * *. The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and more than that, to an act by someone not the speaker. Another tendency, if it had any, was a filament too fine to be disentagled by a jury."

And so in the case at bar. To attempt to urge that the income tax cards were presented to the jury for the limited purpose announced in appellee's brief, and not for the purpose of proving losses, is "a fillament too fine to be disentagled by a jury" listening to a mail fraud case.

Counsel for the Government attempt to justify the introduction of these exhibits by affirming that they were Government records and as such "no other identification was necessary." Identified or not, the exhibits carried with them not a single evidentiary virture. The cases cited by appellee, *Heike v. United States*, 192 Fed. 83 and *White v. United States*, 164 U. S. 100, were anticipated and adequately analyzed

in appellants' opening brief at pages 176 and 177. The adversaries argue that in those cases the Government agents observed the facts which they recorded and that in the case at bar a Government agent recorded a fact which he observed i. e., a return filed. Such agent, however, did not observe the "loss" or the records which reflected it. He observed, if anything, an income tax return compiled and signed by someone whose name as well as whose presence remains, so far as this record is concerned, an utter mystery. The fact that the name of the receiver appears upon Exhibit 110 does not indicate that the receiver prepared or compiled the return or that he signed it, or that he or any representative of his had knowledge of the facts, by virtue of the records of the corporation or otherwise, which necessarily are required to support the returns. As to Exhibit 109, indeed, the name of the president and the name of the treasurer was filled in with a question mark.

There is a virtual confession of error with respect to these exhibits in appellee's brief where, at page 35 it is said, "even if erroneous (these exhibits) could not possibly be *prejudicial enough* to warrant the reversal of this case for a new trial." Since when is the Court required to measure prejudice? Is it a matter of degree? Where does the Court begin and where stop, once it be conceded that the omission or rejection of evidence is to any extent prejudicial?

It is impossible to tell at this time what effect was given to these exhibits by the jury. And, as said by one Court, "It is a poor time for the district attorney to say, after fighting evidence into the record, it did no harm," and, as stated by appellee,"it was not *prejudi-*

cial enough." The jury may well have disbelieved the accountant Null. They may have considered that the books were not sufficiently identified. They may have realized that appellants did not have opportunity to examine the voluminous audit or the books which were in Court and, above all, they may have questioned the identification of the books which were in Court by the witness Brandt. The moment these cards went into evidence the jury, in their lay judgment, probably said to themselves, "Here are Government records. They must be true." They would not stop to indulge in the fine-spun reasoning advanced by a District Attorney struggling to sustain a conviction.

Why, if satisfied with the proof of the financial condition of the corporation, did the Government offer these income tax memorandum cards? The conclusion is inescapable that it was only after extreme difficulty and hesitation that the Null summaries were received, based as they were upon books, not of original entry, which books had been identified by a man squirming in fear of the revelation of his own misconduct and as to whom the trial court had erroneously prevented a proper attack upon his credibility and a proper attempt to destroy his statement upon direct examination that the entries in the books were true and correct. In short, because the whole evidentiary structure of the Government's case wobbled upon a precarious foundation, under the incomprehensible ruling of the trial court, these exhibits were permitted in evidence. The scant three pages in appellee's brief subtract nothing from the presentation of the point by appellants in their opening argument. (See appellants opening brief pp. 77-166 et seq.).

IV.

THE ERRONEOUS RESTRICTION OF THE CROSS-EXAMINATION OF TOM BRANDT

That appellants possessed the means to force this witness to admit that he had testified falsely, and to admit that he had made a fictitious entry in the books of the corporation to cover a thieving transaction of his own, cannot be gainsaid. Fear of this witness and of the probable disaster attending upon his presence as the Government's chief support is, as has been heretofore said, a moving reason why the income tax memorandum cards were grasped as a last minute effort to save the case. His importance to the Government is fully discussed in appellants' opening brief at page 179 et seq. Without Brandt there would have been no identification of the books sufficient to afford even the semblence they did of a basis for the Null statements. The Null summaries were no better than the books and records which they purported to summarize. The books and records were no better than their identification and authenticity. The identification and the "circumstantial guarantee of authenticity" were no better than the witness who did the identifying.

In large part the foundation of the Government's case insofar as its burden to prove beyond a reasonable doubt the falsity of the representations be concerned, rested upon Brandt's statement that the books were kept in the regular order of business (257) and that the entries were true and correct. If Brandt could have been impeached the case would be left with no proof at all of the alleged falsity of the representations because there would have been no identification, by a credible

witness, of the books and consequently no foundation for the Null summaries. Brandt admitted one important false entry which the Court recognized and which the witness designated as a "fictitious entry." The witness then attempted to make an explanation for the purpose of relieving himself of the imputation of dishonesty and to give to his act an innocent aspect. He was permitted to testify that the fictitious entry involved a harmless transferring of funds to the Phoenix Packing Company which he said was to be repaid by the Kansas unit (a concern, by the way, with which the Governmnet must admit, appellants had no connection). The sharp distinction between a fictitious entry which is innocent of any wrong doing and a fictitious entry which is made to cover a criminal abstraction of funds by the same man who makes the entry, is apparent. *As was suggested by this Court upon the oral argument, appellants were stopped by the trial judge in their attempt to develop that the explanation of the fictitious entry was in turn false and constituted indubitable perjury.* This Court may well ask itself the question, "Would it make any difference, in its consideration of Brandt's testimony, whether the fictitious entry was made with an honest intent or with the intent to embezzle the funds of a corporation whose treasurer the witness was elected to be one week before his tortious and criminal embezzlement of its funds? Is it not law and logic and justice that, once a grave irregularity appears, a trial court should painstakingly and eagerly attempt to ascertain all of the facts touching the irregularity?

There, before the Court and before the jury were counsel for appellants who knew Brandt to be an embezzler and a jerjurer, possessing the ability by vir-

ture of a signed confession to force the admission of the theft and of the perjury from the witness' own lips. And they were stopped by the preemptory ruling of the trial judge. Here, before this court, is the District Attorney vigorously contending that the conviction should be upheld, based though it is upon the testimony of Brandt, relying upon the thinnest of technicalities. Our adversaries contend (appellee's brief, 37) that "to impeach a witness by showing a prior contradictory statement, a proper impeaching question must be asked. This question must fix the time and place of the prior statement and the question laying the foundation for impeachment must, in addition, acquaint the witness with the substance at least, if not the exact words, of the alleged prior statement."

This witness was shown his own signed confession in open court (DEFENDANTS' EXHIBIT "E" FOR IDENTIFICATION, Transcript of Record, 417, 419). Could counsel for appellants have followed the rule urged by appellee more strictly?

The District Attorney is strangely mistaken in his explanation of defendants' Exhibit "F" for identification consisting of four (4) checks drawn to the order of this witness by the Phoenix Packing Company upon its account in the Valley Bank of Phoenix, Arizona, and signed by the same Brandt on behalf of the drawer (422, 423). The funds upon which these checks were drawn were deposited to the account of the Phoenix Packing Company by Brandt on behalf of the Stores Corporation. Brandt testified, "Under the promise of A. E. Sanders in Kansas to get funds here I made a fictitious entry and I showed it as a check to the Phoenix Packing Company for $5,000.00 and on the

duplicate voucher *I showed a charge again the Kansas unit * * **" (418). He said further, "It is not a fact that the shortage was my own personal shortage" (417). The checks on their faces, however, show that they were drawn upon the Phoenix Packing Company account, which had been augumented by the funds of the Stores Corporation, to Brandt or order *and they were endorsed by Brandt.* The checks drawn upon the Phoenix Packing Company account were not deposited in the Citizens Bank at five points at all as Brandt testified, (418) but, with the exception of two smaller ones, they were deposited in the Commercial National Bank in which Brandt personally had accounts (419). This appears upon the exhibits themselves (422-423) and from Brandt's own signed statement (419). A perusal of defendants' Exhibit "E" for identification (419) is all that is necessary, it is submitted, to induce this Court promptly to reverse a conviction bottomed upon records the authenticity of which depend upon the testimony of the man who, when caught, admitted in writing his own wrong doing. This is the man who, in rank perjury, testified that "it is not a fact that the shortage was my own personal shortage."

It is urged by appellee that there is no specification of error on the refusal to admit defendants' Exhibit "E" for identification (Brandt's signed confession). Ample assignments and specifications of error were made in connection with the restriction of the cross-examination and this Court has specifically held that voluminous assignments of error are improper and that it is sufficient to make assignments raising typical questions. *Shreve et. al.* vs. *United States*, 73 Fed. (2d) 542, 543). This technical attempt to evade the fatal effect of the trial Court's ruling detracts not a

jot nor a tittle from either the form or the substance of appellants' contentions in this connection.

Under the ruling of the supreme court of the United States, *Alford v. United States*, 282 U. S. 687, cited in appellants' opening brief at page 188, it is clear that no offer of proof is ordinarily necessary in cross-examination.

Counsel for the Government cite and quote from *New York Central R. R. Company v. Dunbar*, 296 Fed. 57 (Appellee's Br. 38) which seems to hold that in confronting witnesses with alleged contradictory statements which contain some relevant and some irrelevant testimony and some statements which are not in contradiction with the testimony in Court, and some which are, such statements may be properly excluded. But, said the Court, "*the trial court gave full opportunity to counsel for plaintiff in error in using the statements, where any contradictions existed.*"

The exhibit as contained in the Transcript of Record *embodies no statement consistent with Brandt's testimony.* If the original happened to contain, as it does not, statements consistent with the testimony it was incumbent upon the District Attorney to insist upon its inclusion in the transcript.

That no offer of proof is required is established by *Alford v. United States*, 282 U. S. 687, where, among other things, the Court said that "*the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply.* (to cross-examination) * * * It is the essence of a fair trial that a reasonable latitude be given the cross-examiner, even though he is unable

to state to the Court what facts a reasonable cross-examination might develop. *Prejudice results from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them*". And, we may well say that, in the instant case, the denial of the opportunity to place Brandt in his proper setting and put his credibility to a test caused the jury to fail fairly to appraise him. (See Appellants' opening brief 188, 189).

What would have been the verdict of the jury if this chief Government witness called and re-called upon all phases of the case, had been forced to admit that he committed perjury when he testified that all the entries under his supervision were correct and that he had taken company's funds one week after he was put in a position as treasurer to handle them? The answer to such questions may only be found in fairer trials than that to which appellants were subjected.

V, VI and VII.

Under the points V, VI and VII of appellants' opening brief, appellants, by specific references to the record and pertinent citation of authorities demonstrated conclusively that the Government failed to prove, by competent evidence, certain material allegations of the indictment, that in the introduction of evidence the Government attempted to prove two distinct and disconnected schemes to defraud and that, instead of proving the offense as layed, introduced evidence affirmatively disclosing that there was no combination in unlawful intent or activity on the part of the defendants.

Because the attempted answer by appellee does not meet appellants in a full and fair discussion upon these grounds but contents itself with a few scattered allusions to the record and the citation of authorities laying down general rules having no particular application to the case at bar, it is believed to be unnecessary, in this reply to do more than request the Court again to peruse appellants' original brief upon these points after it has read the brief for appellee.

Appellee's contentions as to the Driscoll letter (Exhibit 43), which is conveniently called the "indictment letter", have been adequately and completely replied to by appellants' first reply brief (Appellants' Reply Brief 4-25). Only one statement need be added in this connection and that is that it does not appear from the transcript what, if any, of the Loveland letters were shown to the jury to enable them to make comparisons. Many of the documents introduced by the Government were not exhibited to the jury at all by reason of interlineations and superimposed comments inscribed after delivery to the recipient. The record is silent as to whether or not any opportunity was afforded the jury to examine or even look at the alleged signature of "M. Loveland".

In order that there be no misunderstanding about the evidence with reference to the payment of dividends, appellants beg leave to repeat that the payment of the dividend on June 29, 1929 alleged in the indictment (5) *was not proved* at all while the payment of a dividend for June of 1930, a year later, *was not charged in the indictment* and appellants, accordingly, had no notice or knowledge that they were going to be confronted with this event upon the trial.

As to the payment of the dividend in December, 1930, the same unbelievable witness Brandt testified that he told A. E. Sanders that the company had no funds with which to pay a dividend at the end of December, 1930 in the presence *but not necessarily in the hearing*, of the appellant Gus Greenbaum. It is significant to observe that Brandt testified that when he made this statement to Sanders *Gus Greenbaum said nothing.* (330). This versatile witness also made the utterly inconsistent assertion, upon the witness stand, that he prepared a statement from the books of the company for December 31, 1929 and delivered a copy thereof to appellant Gus Greenbaum as well as to a number of trade creditors for the purpose of enhancing credit standing. (263). The witness distinctly said that after the financial statement of December 31, 1929 was prepared, "it was handed to Mr. Gus Greenbaum *as a true and correct statement of the financial condition of the company.*" (334). He said, further, that none of appellants had anything whatsoever to do with the preparation of that statement nor with the books and records of the Stores Company nor with the entries in such books and records. (334).

This statement so prepared by Brandt (Government's Exhibit 40) discloses cash on hand as of December 31, 1929, $51,326.72 and a surplus of $33,780.46. (335). It is hardly conceivable that a surplus of any kind can be created early in a corporation's operations when it is, at the same time, suffering heavy operating losses. The testimony of this witness, who, with deep justification has been assailed heretofore, as to the condition of the company on December 31, 1929, is so plainly self-contradictory that, like the story of his fictitious entry, it is simply unworthy of belief. Upon this point

of the payment of the dividends for December 31, 1929, therefore, the jury were offered two statements of fact, one of which the Government renounces and as to the other it demands full benefit. Had appellants elected to make a complete defense upon this charge they could have done no better than to introduce Brandt's financial statement and this, in an unwary moment, was done for them by the District Attorney.

VIII.

THE SUBSTANTIAL PRACTICES INSTRUCTION

No true effort is made by appellee to sustain the instruction of the Court to the effect that only enough need be proved to satisfy their judgment against the presumption of innocence and that one or more of the "substantial practices" alluded to in the indictment as fraudulent was wilfully employed and that the question for them to determine was whether enough had been proved "within the lines of the charge" and not whether all has been proved. (460, 522). The only response to appellants' contentions in this regard amounts to the proposition that in order to except to an instruction a defendant must mention each word thereof. Rule 30, quoted by appellee states that exceptions may be taken to a charge to a jury "specifying by numbers of paragraphs (the instructions in the case at bar being unnumbered), *or in any other convenient manner*, the parts of the charge being excepted to. The Court's attention is respectfully directed to appellants' opening brief upon the subject of this instruction, at page 217.

IX.

THE COMMON KNOWLEDGE—LOTTERY SCHEME INSTRUCTION.

Appellee's assertion that no exception was taken to the instruction noted in specification of error number 20 is an inexcusable misstatement of the record and it is the only attempt made to avoid the error of the trial Court and appellants' argument thereon.

Before the jury retired to deliberate upon their verdict the following exceptions were taken by counsel: "I want to take an exception, your Honor, to one of the instructions, which says: 'That one of the substantial practices'—I think that is erroneous without defining what is a substantial practice and *when the Court alluded to a lottery scheme and refers to cupidity, I think that is erroneous.*" (481).

Assume that the trial Court had instructed the jury that eagerness to take chances for large gains lies at the foundation of all counterfeiting schemes, or of the sawdust swindle, or of dealing in green coin, green goods or spurious treasury notes, what effect could such an instruction have upon the mind of a jury sitting in the criminal case? And what difference is there between such inept illustrations and the wholly unjustifiable reference to the lottery scheme. Small wonder is it, therefore, that the District Attorney is unable to support such an instruction given in a critical case affecting men standing trial for delivery. (See cases heretofore cited in this brief showing different "schemes" within purview of present Mail Fraud Statute).

CONCLUSION

The language of the Court in *Marcante v. U. S.*, 49 Fed. (2d) 156, while applied to an entirely different situation, might well be heeded in its philosophic implications in the case at bar. There the Court said, "with inexperienced jurors such complicated testimony is too apt to become but a confused jumble, and a verdict too apt to represent an impression that the defendants are guilty of something, with little reference to the crime with which they are charged."

It is respectfully asserted, with deep and profound conviction, that the trial below was neither juristically sound nor substantially fair. For the many patent errors in the record the judgment should be reversed.

Respectfully submitted,

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No. 7695

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Upon Appeal from the District Court of the United States for the District of Arizona

APPELLEE'S PETITION FOR A REHEARING

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RIMS PRINTING CO.

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To the Honorable Curtis D. Wilbur, presiding Judge, and to the associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The United States of America, appellee in the above entitled action, hereby respectfully petitions the Court for a rehearing of this cause on the following grounds:

1. The Court erred in its discussion of the law and facts in connection with the representations alleged and proven to have been made by appellants to the effect that the stores operated and to be operated by the company would be under the guiding hand of Clarence Saunders.

2. The Court erred in confining the responsibility of appellants to representations in regard to the earning of profits and the payment of dividends and in stating that the prosecution relied solely upon such representations.

3. The Court erred in holding that the admission in evidence of accountant Null's summary was erroneous.

4. The Court erred in holding that the refusal to permit the extension of Brandt's cross-examination was erroneous.

5. The Court erred in holding that the introduction in evidence of Government's Exhibits ~~16~~ 189 and ~~17~~ 110 (income tax records) was prejudicial and reversible error.

I

In connection with the first ground for a rehearing, it is apparent that this phase of the case was not discussed with sufficient detail in the Government's briefs on appeal.

The letter of August 12, 1930, referred to in the opinion, was not the only letter sent through the mails containing the representation that the stores were or would be under the guiding hand of Clarence Saunders. This same representation is found in the letter of July 16, 1929, Exhibit 45 (275)*. This letter was written nine months before the indictment letter and at an early stage in the stock selling scheme. What this Court said on page 3 of its opinion in this case, in reference to the letter of August 12, 1930, would not apply to the letter of July 16, 1929. The same representation is found in Exhibit 63 (296), dated August 12, 1930, and in Exhibit 75 (307), dated July 10, 1929. In fact this attempt on the part of appellants to induce the victims of their scheme to believe that Clarence Saunders had and would have a large part in the management of the grocery business runs all through the letters and literature sent out by appellants, from the inception to the close of the stock selling operations.

We particularly invite the Court's attention to the statement contained in some of the exhibits in evidence. In Exhibit 48 (276), dated November 26, 1929, the stores are referred to as the "Arizona Stores". This exhibit alone would probably not be sufficient to show a plan to mislead the purchasers but, when taken into consideration with all the other letters, it fits into the picture and shows a deliberate attempt to make the victims believe that they were buying into a nationwide concern under the personal leadership of Clarence Saunders. We quote the following from one of the letters (279):

---

* Figures in parentheses refer to transcript, unless otherwise designated.

"The writer has had the pleasure of just returning from Memphis, and judging from the volume of business done by *other units* throughout the country, Arizona is among the real leaders. We are trying to make the *Arizona unit* the largest in the country * * * ". (Italics ours).

Was this not a deliberate attempt on the part of appellants to mislead the one to whom this letter was sent? At least, wasn't the answer to this question one for the jury after considering not only this exhibit, but all of the evidence?

We quote from another exhibit in support of the Government's theory that it was the intent of appellants to induce prospective purchasers to believe that Clarence Saunders was practically in full charge and manager of the Arizona Stores (296):

"The stores *were created by a genius* in this particular line of merchandising. Clarence Saunders, through his wonderful merchandising methods, established the Piggly-Wiggly stores, and when retired had built a business in a few years that was prosperous and known all over the world, and *his new stores* are just as much advanced in modern merchandising as his old stores were over the old style grocery. With Clarence Saunders' guiding hands over the different stores to be established under his name, we can only say one thing and that is, within a few years you will find Clarence Saunders Stores the outstanding food distribution stores in the world." (Italics ours).

We believe that this Court erred in announcing in

its opinion that "it would still be his guidance through the store fixtures and in following the instructions". It was for the jury to say, from all of the evidence, what was the purpose and intent of appellants. A jury would be justified in finding that one does not create a store by granting a license to use his name and a specified kind of fixtures. The jury would have the right to say what construction the ordinary individual would place upon the statement about the creating of the stores by a genius when coupled with a statement in the same communication about Clarence Saunders' guiding hand. In limiting these representations to the license and instructions, we believe this Court has taken from the jury its right to determine intent and purpose.

Finally, the conclusions of the Court that the fixtures and instructions provided for in the license are sufficient to support the representation that the stores were or would be under the guiding hand of Clarence Saunders, were based upon an erroneous premise. The Arizona corporation had no contract with Clarence Saunders personally. The licensor *named in the contract* was a corporation (224-225) and not Clarence Saunders personally, and the licensee named in the franchise was A. E. Sanders, not the Arizona Sanders corporation. There is no evidence that this franchise was ever transferred to the Arizona corporation. The minutes of the meeting of directors of the Arizona corporation (242) show an offer on the part of A. E. Sanders to sell the franchise and an acceptance of this offer by the corporation, but there is no evidence of an actual assignment, nor is there any evidence in the record showing consent by the licensor to an assignment. The only evidence in the record is to the

contrary. We quote from the testimony of L. D. Null:

> "If the franchise was owned by the company, I would say it would have some value, but I couldn't say a substantial value. I don't think the franchise was ever assigned." (385).

A. E. Sanders testified (355):

> "Outside of paying that corporation one-half of one per cent royalty on the gross volume of the business, they had nothing to do with our stores after they were established."
>
> " * * * they didn't send any supervisors out to our stores at all."
>
> "They could do so if they wanted to, as we were supposed to keep clean and sanitary stores."
>
> "Clarence Saunders himself never wrote me a letter until after I broke with him, that is, after we changed our name * * *".

The foregoing clearly shows that there was no foundation whatever for the representations that Clarence Saunders had anything to do with the corporation or the stores. There was ample evidence to present to the jury the question of the absence of Clarence Saunders' guiding hand in the business of selling groceries. We submit also that there was ample evidence to submit to the jury the question of appellants' knowledge that Clarence Saunders had no part in guiding the destinies of the Arizona Stores. We quote from the Court's opinion:

> "It is a fair inference from the proofs of the prosecution that * * * appellants as prospective brokers knew the provisions of the license under which the grocery business was to be conducted."

If they knew its provisions, they also knew its limitations and must have known that the licensor was not Clarence Saunders but a corporation. This knowledge on the part of appellants was sufficient to impart to their representations all of the necessary elements of false and fraudulent representations. The legitimacy of the chain grocery store business or the legality of the organization of the company and the securing of permits do not justify false representations in the sale of securities. Even the belief of A. E. Sanders in the possibilities of the chain store business and his belief that appellants thought the business was going to be a success, would not justify the false representations in the sale of stock.

It was unnecessary for the Government to prove that any one was, in fact, deceived by the misrepresentations of appellants. The success of the scheme to defraud is not a necessary element of the crime. It is not even necessary that any one actually be defrauded.

Schauble v. *United States*, 40 F. (2d) 363.

Linn v. *United States*, 234 Fed. 543.

Stunz v. *United States*, 27 F. (2d) 575.

Foster v. *United States*, 178 Fed. 165.

We have discussed this point at some length because we feel that whatever this Court may say as to the other points upon which the case was reversed, the law on this particular point should be correctly stated.

In the event of a new trial, the opinion of this Court becomes the law of the case and binding upon the Trial Court. We do not believe that the question of the representations in regard to Clarence Saunders should be eliminated from the consideration of the jury at the retrial.

In support of the Government's theory that the issues herein discussed are proper issues for the jury to determine, we cite the following authorities:

Kaplan v. *United States*, 18 F. (2d) 939.

Gewertz v. *United States*, 35 F. (2d) 27.

Hyney v. *United States*, 44 F. (2d) 134.

Robinson v. *United States*, 33 F. (2d) 238, 240 (9th C. C. A.).

Baldwin v. *United States*, 72 F. (2d) 810, 814 (9th C. C. A.).

Cooper v. *Schlesinger*, 111 U. S. 148, 155.

Durland v. *United States*, 161 U. S. 306.

Mansfield v. *United States*, 76 F. (2d) 224, 231.

In the case of *Gewertz* v. *United States*, supra, it was held that omissions of notes from list of liabilities in statements, presented question for jury whether omission was knowingly or wilfully made with fraudulent intent.

In the *Hyney case*, supra, it was held that the intent and knowledge of defendant was a question for the jury. It is true that the defendant in that case was president and principal stockholder in the company but, in the present case, appellants had knowledge of the provisions of the license, that the licensor was a corporation and not Clarence Saunders, and their close connection with the company in the sale of stock afforded them ample means for ascertaining the true situation. The question as to whether they engaged in a stock selling scheme with guilty knowledge, was one for the jury. *Robinson* v. *United States*, supra. We quote from page 240 of that opinion:

> "The testimony was ample to show that he took an active part in the conduct of the business of Cromwell Simon & Co., and whether he so participated with guilty knowledge was a question of fact for the consideration of the jury under the testimony in the case."

We quote from the opinion by Judge Wilbur, in the case of *Baldwin* v. *United States*, supra, wherein the evidence was held sufficient to justify the submission of the case to the jury:

> "Many of the investors to whom the salesmen appellants sold stock were called as witnesses and testified to false representations made to them by

the salesmen, in addition to those contained in the sales kits and which *must have been known by the salesmen to be false or at least which they had no reasonable ground for believing to be true.*" (Italics ours.)

We quote from *Cooper* v. *Schlesinger*, supra, at page 155:

"The jury were properly instructed, that a statement recklessly made, without knowledge of the truth, was a false statement knowingly made, within the settled rule."

We call the Court's attention to the opinion of Judge Brewer, in the case of *Durland* v. *United States*, supra, and particularly to that portion found on pages 313 and 314.

Section 5480 Revised Statutes of the United States (18 U. S. C. 338) has been construed by the Supreme Court as "including everything designed to defraud by representations as to past or present or suggestions and promises as to the future." *United States* v. *Stever*, 222 U. S. 167, 173.

We quote from *Mansfield* v. *United States*, supra:

"He found that the company sustained losses in each of those years, and that the liabilities exceeded the assets from the very beginning. Greater elaboration upon the testimony of these witnesses would only serve to emphasize the controversial nature of the fact question presented. *In its last analysis, it was properly a question of fact for the*

jury whether the financial statements falsely represented the condition of the company to the prospective purchasers of its stock and bonds." (Italics ours).

In the present case, it was properly a question for the jury whether the representations regarding Clarence Saunders' guiding hand falsely represented his connection with the company.

II

There were many false representations in addition to the representations that profits were being earned and dividends properly paid.

The representations in the letter set out in part in the opinion to the effect "our common stock is now being sold at $7.50 per share, this raise being justified by the very satisfactory condition of the company, which has really exceeded our expectations." were false. The condition of the company, operating at a loss, did not justify the raise in the price of stock. Proof of a loss would at least place upon appellants the burden to show by some evidence that, in spite of that loss, the raise was justified. There is no such evidence in the record. The assumption by this Court that these representations might have been true, in rapidly establishing twenty-five new stores and building up trade for them, is based upon representations and statements contained in letters and literature prepared by appellants, without any proof to sustain them. The burden on the prosecution to prove that the statements that the business was prosperous and in a satisfactory condition were false, was met and

sustained by the proof that the business was operating at a loss. This raised a question of fact for the jury.

Mansfield v. *United States*, 76 F. (2d) 224, 231.

Baldwin v. *United States*, 72 F. (2d) 810, 813.

The attention of the Court is directed to the quotation from the *Mansfield case*, supra.

We also quote from the opinion of Judge Wilbur in the *Baldwin case*, supra:

> "The books of the Baldwin Company show that during the stock selling campaign the company was continually losing money but in spite of this the price of the stock was arbitrarily raised from time to time to induce people to buy stock and to induce them to believe, as had been so often falsely stated, that the business of the company was very successful and profitable."

We submit that the opinion in this case is a departure from the principle laid down in the *Baldwin case*.

III

The Court erred in holding that the admission in evidence of the summary of accountant Null was erroneous. The Court's ruling on this point is based upon the assumption that the books in Court, which were made available to appellants and upon which the testimony and summary were based, were not the first permanent records of the company. It is the contention of the Government that appellants made represen-

tations as to the condition of the company and as to the earning of profits which they knew to be false or were made in reckless disregard of the truth.

The books in Court, which were marked for identification, were the books of the company kept in the Phoenix office. There was ample evidence that these books were correct. The representations made by appellants were either based upon these records or they were made without any effort by appellants to ascertain the truth. These books were available to appellants at the time they were conducting the stock selling campaign. Can it be the law that one, with the truth available to him, may make false representations and escape punishment because of deliberate failure to ascertain the truth? There was only one source from which appellants could have determined the condition of the company and the question of profit or loss. That was from the books in the Phoenix office, the same books that were in Court. Had appellants availed themselves of this opportunity and had their representations truly reflected the facts as revealed by these books, they could not have been held criminally liable, even though the books and the representations were not correct. Appellants having made representations not sustained by the only records available to them, and the Government having proven that they made the reppresentations and having shown the truth as revealed by the records, it was then the duty of appellants to justify their representations. However, with or without such evidence on the part of appellants, there would be a question of fact for the jury to determine.

Redmond v. *United States*, 8 F. (2d) 24.

Parker v. *United States*, 203 Fed. 950, 951.

Wilson v. *United States*, 190 Fed. 427, 437.

We wish to call the Court's attention to the entire statement on page 437 of the opinion in the *Wilson case* supra. We quote in part from this opinion:

> "Moreover, a person who makes statements concerning the condition or affairs of a corporation is not in a position to object when the regular books of the corporation are used against him. If he be an officer of the corporation and make such representations he should certainly be bound by the books and if he be a stranger, and make statements without knowledge he cannot complain. We think that the rulings of the trial court upon the documentary evidence were correct."

In speaking of the admission of summaries taken from books, the Court, in the *Redmond case* supra, said:

> "It was a convenient summary of the business of the company for that year, and was made up from records which the witness had requested his bookkeeping force to keep and under his supervision. This was clearly admissible."

IV

There was no refusal by the Court to permit the cross-examination of witness Brandt on the very point on which the decision of this Court says cross-examination should have been permitted. There was no con-

tention on the part of appellants that there was any error in the books, except as to the $5,000 advanced to the Phoenix Packing Company. This question was gone into in detail, both on direct and cross-examination of Brandt (415, 416, 417, 418). When appellants made their avowal, the following colloquy took place between Court and counsel:

> "The COURT: I think the matter of *keeping the books* would be proper cross examination, Mr. Flynn.
>
> Mr. FLYNN: I don't apprehend that we have to separate counsel's avowal.
>
> The COURT: No, that is true.
>
> Mr. FLYNN: We are objecting to the entire avowal.
>
> The COURT: There is probably something in the avowal which is pertinent. I think there are other matters that are not. * * *" (427, 428).

Appellants were given an opportunity to cross-examine on the matter of keeping the books. Their attention was called to the fact that their avowal contained objectionable matter, as well as some that was not objectionable. In spite of this fact, they made no effort to cross-examine further on the book entries, for the very obvious reason that they had already covered on cross-examination the only entries in the books, the correctness of which were questioned. If they had any contradictory statements made by the witness,

the way was open to them and there was no ruling by the Court prohibiting further proper cross-examination.

We earnestly request a careful consideration by the Court of the record, in order that, in the event of a retrial, the same may be conducted in accordance with the well-established rules of evidence. We cannot comprehend how appellants can complain of being restricted in their cross-examination when the records fail to disclose a single question propounded to Brandt to which there was an objection made.

V

The Government contends that the record in this case clearly establishes the fact that appellants made false representations as to the guiding hand of Clarence Saunders, the condition of the company, the earning of profits and the payment of dividends. The evidence on these points is uncontradicted. Therefore, the admission in evidence of the income tax records does not constitute reversible error. When a verdict of a jury is supported by uncontradicted competent evidence, the admission of cumulative evidence, even if improperly received, would not justify a reversal of the case.

Arnold v. *United States*, 7 F. (2d) 867, 870 (Syl. 9).

Marron v. *United States*, 18 F. (2d) 218 (9th C. C. A.) (and authorities therein cited).

Stewart v. *United States*, 211 Fed. 41 (9th C. C. A.).

Cook v. *United States*, 159 Fed. 919.

Harrod v. *United States*, 29 F. (2d) 454.

Irving v. *United States*, 53 F. (2d) 55 (9th C. C. A.).

Bonnoyer v. *United States*, 63 F. (2d) 93.

Lewis v. *United States*, 38 F. (2d) 406 (9th C. C. A.).

Bilodeau v. *United States*, 14 F. (2d) 582 (9th C. C. A.).

United States v. *Brown*, 79 F. (2d) 321.

CONCLUSION

In submitting this petition for a rehearing, we have not attempted to exhaust the authorities on the questions raised by the petition. We have only endeavored to stress some of the phases of the case not sufficiently covered in our briefs on appeal and to point out to the Court that justice requires that we be given the opportunity to assist this Court in arriving at the correct solution. The importance of this case, as well as the importance of the legal questions involved, justify further consideration.

We earnestly and respectfully ask that a rehearing

be granted to correct the errors in the Court's decision.

Dated at Phoenix, Arizona, November 21, 1935.

Respectfully submitted,

F. E. FLYNN,
United States Attorney,

C. A. EDWARDS,
Assistant United States Attorney,

Attorneys for Appellee.

The undersigned hereby certify that in their judgment, and each of the undersigned hereby certifies that in his judgment, the foregoing petition for a rehearing is well founded and meritorious and that it is not interposed for delay.

Dated at Phoenix, Arizona, this 21st day of November, 1935.

F. E. FLYNN,
United States Attorney.

C. A. EDWARDS,
Assistant U. S. Attorney.

Attorneys for Appellee.

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TABLE OF CASES CITED

STATUTES CITED

NO. 7727

United States
Circuit Court of Appeals
For the Ninth Circuit

WILLIAM C. KOTTEMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals

THE RECORDER PTG. & PUB. CO., 460 FOURTH ST., S. F.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

[1*] Docket No. 45929

United States Board of Tax Appeals

WM. C. KOTTEMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES

For Taxpayer: A. Calder Mackay, Esq., Arthur McGregor, Esq.,

For Commissioner: T. M. Mather, Esq., E. M. Woolf, Esq.

DOCKET ENTRIES

1929

Oct. 4—Petition received and filed. Taxpayer notified. Fee paid.

" 5—Copy of petition served on General Counsel.

Dec. 2—Answer filed by General Counsel.

" 4—Copy served on taxpayer. Circuit Calendar.

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*Page numbering appearing at the top of page of original certified Transcript of Record.

1933

July 11—Hearing set week beginning September 25, 1933, Long Beach, California.

Oct. 5—Hearing had before Mr. Van Fossan, Division 9, on merits. Appearance of A. Calder Mackay and A. McGregor, Esqs. Amended petition in 45929 filed. Briefs due December 1, 1933. No exchange.

" 18—Transcript of hearing of October 5, 1933 filed.

Nov. 23—Motion for extension to January 30, 1933 to file brief filed by taxpayer. November 25, 1933 Granted to December 15, 1933. Both parties.

Dec. 14—Proposed findings of fact and brief filed by taxpayer.

1934

Mar. 6—Memorandum opinion rendered—Mr. Van Fossan, Division 9. Decision will be entered under Rule 50.

" 28—Order correcting memorandum opinion entered.

Apr. 3—Notice of settlement filed by General Counsel.

" 6—Hearing set April 25, 1934 on settlement.

" 25—Hearing had before Mr. Morris, Division 14, on settlement—Rule 50. Referred to Mr. Van Fossan.

" 27—Decision entered—Mr. Van Fossan, Division 9.

July 23—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

" 23—Proof of service filed by taxpayer.

Sept. 18—Motion for extension to November 21, 1934 to complete record filed by taxpayer. Granted.

Nov. 19—Praecipe filed—proof of service thereon.

" 19—Order enlarging time to December 31, 1934 for transmission and delivery of record entered.

[2] [Endorsed]: Filed Oct. 4, 1929

Docket No. 45929

United States Board of Tax Appeals

WM. C. KOTTEMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:AR: B-10-HRK-60K) dated August 7, 1929, and as the basis of his appeal sets forth the following:—

JURISDICTION OF THE BOARD

1. The taxpayer is a resident of the State of California and is married.

2. The deficiency letter, a copy of which is attached, was mailed to the taxpayer on August 7, 1929, and discloses a deficiency in tax of $2,878.63 for the year 1927.

3. The taxes in controversy are Income Taxes for the calendar year 1927 and the amount is less then $10,000.00.

ASSIGNMENTS OF ERROR

4. The determination of tax contained in the said deficiency letter is based upon the following errors:

(a) The commissioner has erred in denying to the taxpayer the right to treat as a proper business expense and as a deduction from his gross income the amount of certain legal fees paid by him.

(b) The Commissioner has further erred in alleging that such legal expense was not a proper business deduction.

[3] (c) The Commissioner has further erred in disallowing the deduction of that legal expense by not taking into consideration all of the facts, circumstances and conditions directly or indirectly associated or connected with that expenditure for legal expense.

(d) The Commissioner has further erred in disallowing bad debts written off in the respective amounts of $12,305.71 and $1,015.65, which amounts the Commissioner has erroneously alleged were not uncollectible and were not bad debts although acknowledging that the debtors were in the hands of receivers.

(e) The Commissioner is further in error in alleging that such bad debts and/or no portion thereof was properly deductible by the taxpayer in 1927 due to the fact that the receivers of the debtor corporations proposed to pay the unsecured claims in stock; and the Commissioner is further in error in

denying the taxpayer the right to the deduction by holding that the stock to be received from the receivers will take the place of the indebtedness and will have the same value as the indebtedness incurred.

(f) The Commissioner has further erred in denying the taxpayer the deductions for bad debts and legal expense due to the fact that in equity to the taxpayer such deductions should be allowed during that year in order to more truly reflect the correct and proper taxable net income; and the Commissioner has further erred in disregarding the fact that there was an abnormal gross income reported by the taxpayer during that year, a substantial portion of which gross income was represented by the uncollectible accounts which the Commissioner now erroneously disallows.

[4] (g) Accordingly the Commissioner has erred in the calculation of the net income subject to tax and in the calculation of the tax liability and of the resulting deficiency in tax.

STATEMENT OF FACTS

(5) The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) The taxpayer, Wm. C. Kottemann, is a citizen of the United States, residing in the State of California, and is engaged in the practice of public accounting and is licensed to practice as a Certified Public Accountant in the States of New York and California. He has been for a number of years

engaged in the practice of accounting in the State of California.

He has consistently filed correct, proper and true returns of taxable income on an accrual basis for a number of years.

A considerable part of the taxpayer's practice consists of investigations and audits made in the usual course of business by him and his organization at the request of, or upon the recommendation of, bankers, stockholders, attorneys, et cetera.

During the month of May, 1926, the taxpayer was requested to arrange a conference with certain officers of the Pacific-Southwest Trust & Savings Bank of Los Angeles relative to an investigation and audit which the officers of that bank desired the taxpayer to make.

Prior to that time there had been organized and there was in operation a corporation known as the Julian Petroleum Corporation, of which Mr. C. C. Julian was the President. Stock in that corporation had been sold to thousands and thousands of stockholders. [5] Several years subsequent to the organization of that corporation Mr. S. C. Lewis acquired the control of the Julian Petroleum Corporation from Mr. C. C. Julian.

Mr. S. C. Lewis proposed certain expansion, certain mergers and consolidations and other steps involving refinancing the company. His major financing was to be through the issuance of certain first mortgage bonds. It appears that there was some difficulty in carrying out the financial program due

principally to the unsatisfactory and rather hectic conditions in connection with the stock market trading in the Preferred and Common stocks of the Julian Petroleum Corporation. It was alleged by Mr. Lewis that he could remedy that situation and accordingly he and/or his associates acquired a stock brokerage business which had been in existence for a long time prior thereto. He acquired the business formerly conducted under the name of A. C. Wagy & Co. and incorporated a new company known as A. C. Wagy & Co., Inc.

At the conference held at the bank with Messrs. Motley H. Flint and I. L. Rouse, Vice-President of the Bank, various conditions and circumstances were explained to the taxpayer. They told the taxpayer that they desired an audit and investigation to be made of A. C. Wagy & Co., Inc., due to the fact that they were lending, or proposed to lend, money to that company and/or to S. C. Lewis. At that time the public had no knowledge of the acquisition of that brokerage house by S. C. Lewis. The taxpayer was informed that the bank, acting through its officers, had insisted in their negotiations with Mr. Lewis that the bank should be give the right to select an [6] auditor of their own choice who, however, was to report to the bank any and all of his findings although any such information was to be made available to Mr. Lewis so that he might derive the benefit therefrom.

The necessary audits and investigations were started. There were numerous errors and con-

sequently thousands of adjustments. The business of that brokerage house grew by leaps and bounds. The extent of its trading ran into considerable sums. It rapidly outgrew the volume of business which it could do on its rather limited capital. Its principal trading was in the Preferred and Common stock of the Julian Petroleum Corporation and it encouraged, by every possible manner, the purchase on the part of the public of the so-called Julian stocks. During that entire time the stock market trading continued hectic, with violent fluctuations, rapidly rising markets, and sudden declines (affecting the Julian stocks.)

As the result of our audits and investigations important information was from time to time imparted to the officers of the bank and to Mr. S. C. Lewis. Our original audits were followed by subsequent investigations and audits. The financial status and condition of the brokerage house needed constant attention in order to give the information to the bank while the bank was proceeding with its plans for the refinancing of the proposed Julian Petroleum Corporation merger.

During the processes of our auditing and investigating we learned that there were rumors on the street relative to the possibility that stock of the Julian Petroleum Corporation had been is- [7] sued in excess of the amount permitted to be issued by the State Corporation Department and even to the extent that it might exceed the total authorized capitalization of the company. In line with our duty that information was imparted to the officers

of the bank with the recommendation that there was a possibility of a moral obligation on the part of the bank before definitely concluding any proposed underwriting of bonds and the junior financing that there should be definite assurance as to the amount of stock outstanding. That resulted in conferences between the officials of the bank and Mr. Lewis.

The capital stock records of the Julian Petroleum Corporation had been for several reasons moved out of the State of California and were being kept in New York City. Upon the insistence of the bank those records were, however, brought back to the State of California and the bank insisted that an audit of those capital stock records should be made by the auditor of their selection for the purpose of ascertaining how much stock was actually outstanding. The taxpayer was accordingly engaged to make that audit.

Some delay was experienced in returning the books to the State of California and after their return there were further delays due to the activity in the transfer office and the fact that the records had not been kept up currently and because of thousands of transactions not having been recorded. Those records were dealt out to the auditors piecemeal. During that entire period the bank was still kept informed as to the progress being made, the difficulties encountered, our various findings, et cetera.

[8] It so happened that during the course of the audits which were being made of A. C. Wagy &

Co., Inc. and of the capital stock records, that the State Corporation Department of the State of California desired some information and also desired to make their own investigations. An agreement was entered into, however, between S. C. Lewis and the State Corporation Department whereby and wherein any and all information secured by the taxpayer, resulting from his investigations and audits, was likewise to be made available to the proper representatives of the State Corporation Department. The writer accordingly was imparting information not only to Mr. Lewis and the officers of the bank but to the heads of the State Corporation Department.

In spite of the difficulties and overcoming terrific obstacles, and solely as a result of his own dominating insistence, together with the cooperation of the bank and the State Corporation Department, the audit of the capital stock records was completed and the taxpayer immediately upon the completion of that work exposed the substantial overissue of the Julian stocks, reporting that information promptly upon the completion to Mr. Lewis, the bank and the State Corporation Department and insisted that that information should be given to the Board of Governors of the Stock Exchange and to the public in general. Reference to the newspaper files at the time of the Julian crash confirm the fact that the taxpayer exposed the overissue. The entire matter was immediately laid before the District Attorney of the County of Los Angeles and

was shortly thereafter presented to the Grand Jury of the County of Los Angeles.

[9] By devious processes many of the most prominent representative citizens of the State of California had been brought into contact with the company, with its officers, with its stock, with its market operations, with its loans, et cetera, et cetera. It has been said that the Julian Petroleum Corporation fiasco was the biggest thing of its kind ever perpetrated in the financial history of the world.

The taxpayer endeavored to aid and assist the District Attorney's office and the Grand Jury to contemplate the various ramifications which had been discovered by him as the result of his investigations and audits. For reasons which were not at that time known, the taxpayer with hundreds of other prominent citizens was indicted by the Grand Jury. There were investigations by Federal authorities, and by the Bureau of Internal Revenue.

The taxpayer was indicted, along with others, on two conspiracy charges: First, conspiracy to issue Julian Petroleum Corporation stock in excess of that permitted by the State Corporation Department, and, secondly, conspiracy to defraud through the sale of such overissued stock. A trial was held and there was a unanimous vote of acquittal for all of the defendants. In connection with the original indictments or in connection with the Julian crash no one has as yet been convicted except that one of the defendants, E. H. Rosenberg, and the District Attorney, Asa Keyes and his Chief Deputy, Harold L. (Buddy) Davis were subsequently convicted on

charges of bribery in connection with the Julian mess. During the course of the trial of the taxpayer and his co-defendants special investigators, [10] assigned by the Commissioner of Internal Revenue or by his representatives, listened to the entire proceedings and they are familiar with the evidence submitted, the arguments of counsel, et cetera.

Needless to say, there was not one bit of evidence against this taxpayer. All of the evidence introduced plainly indicated that he had exposed the overissue and that he had been constantly revealing instead of concealing the irregularities in connection with the stock issue and that every action on his part was exactly contrary to what would be expected of one who was engaged in a conspiracy to overissue stock or to defraud the public. He aided, through many of the investigations, the representatives of the Commissioner of Internal Revenue and assisted the receivers who were appointed for A. C. Wagy & Co., Inc. and the Julian Petroleum Corporation. At no time was there hardly a single individual who could understand why the taxpayer, after exposing the fraud, had been indicted. Subsequent developments, however, resulting in the conviction of the District Attorney and his Chief Deputy might be deemed to throw some light on that indictment.

Even an innocent man who has become enmeshed in such a fiasco must retain able counsel. Accordingly the taxpayer entered into a contract with the firm of Scarborough & Bowen for a fee of $20,-

000.00, to advise with him and to defend him in connection with the matters previously referred to herein.

It must be clear that the taxpayer's contact with the Julian Petroleum Corporation and A. C. Wagy & Co., Inc., was solely and only in his capacity as an auditor and investigator, principally [11] for ourside interests. The extent of the work done resulted in an increase in his gross income for the years 1926 and 1927. His contact was accordingly of a purely business nature. His indictment was occasioned because of that business contact. The legal expense involved must accordingly be deemed to be a necessary business expense and, as such, is contended to be properly deductible from the gross income.

The taxpayer, who is licensed to practice before the United States Board of Tax Appeals, is and has been for years familiar with the various Revenue Acts, the Regulations promulgated by the Commissioner of Internal Revenue, and is familiar with the decisions rendered by the United States Board of Tax Appeals covering various matters and, incidentally, relative to their decisions covering the payment of legal expenses in connection with any criminal indictment. There is no parallel in any case decided by the Board to the case now presented by the petitioner.

It has been stated that the books of the taxpayer have been kept on an accrual basis. There was deducted, however, during the year 1927 only such portion of the legal expense as had actually been

paid, due to the fact that at that time negotiations were pending whereby at least a portion of the legal expense would be paid by the bank which had engaged his services and the taxpayer though the only fair thing to do at that time was to deduct only such amounts as were paid during the various calendar years until such negotiations had been definitely settled and anticipated that when such negotiations were concluded an amended return could be prepared and filed.

[12] Because of the conditions previously explained the two corporations, A. C. Wagy & Co., Inc., and the Julian Petroleum Corporation, went into the hands of receivers. There was a period of negotiation and litigation and the best brains of the state devoted considerable time considering plans for salvaging as much as possible for the creditors and stockholders. For a time it was believed that bankruptcy and liquidation was the only solution. That, however, would have left the stockholders with no opportunity to recover anything, or only a very small and insignificant part of their respective investments. There was no question in anyone's mind but what everyone would have to take a substantial loss, with the exception of the secured creditors.

Most accountants, for income tax purposes, report on a cash basis. This taxpayer reports on an accrual basis. There is included in with the gross income all of the fees charged. At the time when the return was prepared the taxpayer and everyone else believed those debts to be uncollectible. The

law and the regulations permitted a man in his discretion and within reason to write off his uncollectible debts. The regulations likewise provide, however, that should a bad debt, once written off, be subsequently collected in whole or in part, that such amounts should be returned as income when and as collected. The taxpayer has not yet received any stock in settlement of his claim but has made a partial collection in cash of such portion of the fees as were chargeable against the receivers who retained him to complete his report on the status of the stock outstanding.

[13] To tax the gross income in 1927 at high surtax rates, although it is admitted that a substantial part of the bad debts written off but included in the gross fees will be uncollectible at least to a very substantial degree, is not equitable and is not fair. If the taxpayer was to-day to receive the stock contemplated to be issued to creditors that stock would only be worth approximately 1/20th of the amount of the debt. To permit the taxpayer only to deduct the 19/20ths loss during a subsequent year in lower brackets of surtax rates would not be fair and equitable. When the engagement was originally contracted for there was no contemplation of receiving practically worthless stock in consideration therefor.

This statement of facts may seem rather lengthy but it is in reality only a very rough outline. Obviously the taxpayer could elaborate considerably in this statement of facts. Only sufficient has been placed before you to justify the taxpayer's conten-

tion that the legal expense and the uncollectible fees are proper deductions. It is confidently expected that when the Commissioner's office is fully aware of all of the facts and circumstances in connection with those two disallowed items that they will be allowed and that the return as filed will be approved.

PROPOSITIONS OF LAW

6. The taxpayer in support of his appeal relies upon the following propositions of law:

Section 214 of the Revenue Act permits individuals to deduct as business expenses, under Section 214 (a)1 all of the "Ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

[14] The expenses deducted for legal fees are deemed to be a proper legal expense of the taxpayer and that such expense was a necessary expense incident to his business.

Section 214 (a)7 provides

"In computing net income there shall be allowed as deductions debts ascertained to be worthless and charged off within the taxable year and when stated that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part."

It is contended that the debts deducted by the taxpayer were ascertained to be worthless in 1927 and were charged off within the taxable year, and especially is that point pertinent because the deduction

serves to reduce the gross income which includes those uncollectible fees during that same year. There is no one to deny the fact that the debt was at least partially worthless and, even though it is construed that stock may be issued in lieu of the debt, the fact that the stock, when issued, has a value so negligible as to almost make it worthless justifies the deduction in 1927. . The fact that receivers were appointed for both companies is an indication of the worthlessness of the debt at the time.

The Regulations state "Bankruptcy is generally an indication of the worthlessness of at least a part of an unsecured and unpreferred debt".

In connection with worthless securities the Regulations state that if the taxpayer is able to demonstrate to the satisfaction of the Commissioner that there is an uncollectible part of [15] a debt evidenced by bonds or other similar obligations due to the financial condition of the debtor, he may make such deduction.

WHEREFORE, the taxpayer respectfully prays that this Board may hear and determine its appeal.

WM. C. KOTTEMANN
814-820 Western Pacific Bldg.,
1031 South Broadway,
Los Angeles, California.

[16]
State of California
County of Los Angeles—ss

WM. C. KOTTEMANN, being duly sworn, says he is the taxpayer named in the foregoing petition

and that he accordingly is authorized to verify the foregoing petition and that he is familiar with the statements contained therein and that the facts and statements contained therein are to the best of his knowledge and belief correct and true.

WM. C. KOTTEMANN

Sworn to before me this 30th day of September, 1929.

[Seal] MINNIE H. LUDTKE,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires March 18, 1930

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[17] TREASURY DEPARTMENT
Washington

Office of
Commissioner of
Internal Revenue August 7, 1929

Mr. William Kottemann,
1031 South Broadway,
Los Angeles, Calif.

Sir:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1926 and 1927 discloses a deficiency of $2,878.63, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax

Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROB'T H. LUCAS
Commissioner.

By: DAVID BURNET
Deputy Commissioner.

Enclosures

Statement
Form 866
Form 882

Form 7928—Rev. Dec., 1928

[18] STATEMENT
IT:AR:B-10
HRK—60D August 7, 1929

In re: Mr. William Kottemann,
1031 South Broadway
Los Angeles, California

Tax Liability

Year	Corrected Tax Liability	Tax Previously Assessed	Deficiency
1926	$4,299.63	$4,299.63	None
1927	5,684.29	2,805.66	$2,878.63
Totals	$9,983.92	$7,105.29	$2,878.63

The report of the Internal Revenue Agent in Charge at San Francisco, California, for the years 1926 and 1927, has been reviewed and approved by this office with the following exception:

1927

Bad debts of $12,305.71 and $1,015.65 claimed on your return as being uncollectible from the Julian Petroleum Corporation and the A. C. Wagy and Company, Incorporated, respectively, were allowed by the agent for 50% or $6,660.68 for the reason that it is doubtful whether more than 50% of the debts will ever be collected. This office, however, holds that no part of the bad debts are deductible in 1927 for the reason that they have not been ascertained to be worthless since both companies, now in receivership, propose to pay the unsecured claims

in stock. In this event the stock that will be received takes the place of the indebtedness and any loss sustained when the stock is disposed of is deductible.

1926

Your return for the year 1926 disclosing a net income of $46,894.70 and a tax liability of $4,299.63 has been accepted by this office as originally filed.

1927

Net income disclosed by return		$38,064.58
Add:		
1. Legal fees	$ 3,500.00	
2. Bad debts	13,321.36	16,821.36
Corrected net income		$54,885.94

[19]

Mr. William Kottemann.		Statement
Brought forward		$54.885.94
Less:		
Personal exemption	$3,500.00	
Dividends	1,981.51	5,481.51
Income subject to normal tax		$49,404.43
Normal tax at 1½% on $4,000.00		$ 60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $41,404.43		2,070.22
Surtax on $54,885.94		3,644.03
Total		$ 5,894.25

Less:		
Earned income credit	$ 206.25	
Tax paid at the source	3.71	209.96
Corrected tax liability		$ 5,684.29
Tax previously assessed		2,805.66
Deficiency in tax		$ 2,878.63

Explanation of Changes

1. Legal fees paid to Scarborough and Bowen for defending you against an indictment are disallowed since they are a personal expense. See appeal of Estate of George Backer published in United States Board of Tax Appeals Volume 1, Pages 214.

2. This item has been fully explained above.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

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[20] [Title of Court and Cause.]

[Endorsed]: Filed December 2 1929

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations in paragraph 1 of the petition.

2. Admits the allegations in paragraph 2 of the petition.

3. Admits the allegations in paragraph 3 of the petition

4. Denies the allegations of error in sub-paragraphs (a) to (g), inclusive, of paragraph 4 of the petition.

5. Denies the allegations in paragraph 5 of the petition.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that petitioner's appeal be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

OF COUNSEL: A. H. MURRAY, Special Attorney, Bureau of Internal Revenue.
AHM/SEP/vgs 11/2/29

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[21] [Title of Court and Cause.]

[Endorsed]: Filed Oct 5 1933

FIRST AMENDMENT TO PETITION

Comes now the Petitioner and having first obtained leave of the Board files this as his First Amendment to Petition, appealing from the deter-

mination of the Respondent set forth in his deficiency letter dated August 7, 1929, symbols IT:AR:B-10 HRK-60D. Petitioner prays that his original petition be amended by the insertion of the following paragraphs:

I

That a new assignment of error under paragraph IV of the original petition be inserted, designated as (h) as follows:

(h) Respondent erred in failing to recognize the community property laws of the State of California, which gave a vested interest to Petitioner's wife in community income acquired on or after July 29, 1927, thereby overstating the net taxable income of this Petitioner.

II

That two new paragraphs be inserted in the statement of facts in the original petition under paragraph V, designated as 5 (b) and 5 (c), as follows:

5 (b) During the year here under appeal Petitioner earned as a result of his professional services the sum of $21,430.80 subsequent to July 29, 1927, the effective date of the Civil Code Amendment by the [22] Legislature for the State of California which declared a vested interest in Petitioner's wife in community earnings. Notwithstanding the fact that Petitioner and his wife filed separate returns, the Respondent in determining Petitioner's net taxable income added the entire amount of income so

earned after July 29, 1927 as taxable income to the Petitioner, thereby overstating Petitioner's taxable income by at least $10,715.40.

5 (c) Petitioner alleges that he has overpaid his taxes for the year 1927 and prays that the Board hear and determine his petition as amended and render judgment in accordance with the foregoing, and order the taxes so overpaid by Petitioner be refunded. Petitioner prays for such other and further relief as may be deemed meet and proper in the premises.

THOMAS R. DEMPSEY (Sgd)
A. CALDER MACKAY (Sgd)
ARTHUR McGREGOR (Sgd)
Attorneys for Petitioner
1104 Pacific Mutual Building
Los Angeles, California.

[23]

State of California
County of Los Angeles—ss.

WM. C. KOTTEMANN, being first duly sworn, deposes and says: That he is the Petitioner above named; that he has read the foregoing First Amendment to his Petition and knows the contents thereof and that the same is true of his own knowledge except the matters which are therein stated to be upon information and belief and that as to those matters he believes it to be true.

WM. C. KOTTEMANN (Sgd)

Subscribed and sworn to before me this 5th day of October, 1933.

(s) CARTER DALY
Notary Public in and for said County and State.
Authorized to administer oaths under the Revenue Act of 1926

Respondent entered a general denial to the amendment to the petition at the hearing on Oct. 5, 1933.

[24] United States Board of Tax Appeals

WM. C. KOTTEMANN, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

BERTHA M. KOTTEMANN, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket Nos. 45929, 61238, 61239, 61240, 61241.

A. Calder Mackay, Esq., and Arthur McGregor, Esq., for the petitioners.

T. M. Mather, Esq., for the respondent.

MEMORANDUM OPINION

VAN FOSSAN: Petitioners bring these proceedings for the redetermination of deficiencies in income taxes for the calendar years 1927, 1928 and 1929 as follows:

Docket No.	Petitioner	Year	Deficiency
45929	Wm. C. Kottemann	1927	$2,878.63
61238	" "	1928	41.36
61239	" "	1929	325.49
61240	Bertha M. Kottemann	1928	40.64
61241	" "	1929	158.48

In this opinion the term "petitioner" will be used to refer to Wm. C. Kottemann individually, references to Bertha M. Kottemann being made in other terms.

[25] The cases involve the following propositions:

(1) Is the petitioner entitled to a deduction for

the year 1927 of bad debts written off as uncollectible in the amounts of $12,305.71 and $1,015.65, which were due from the Julian Petroleum Corporation and A. C. Wagy & Company, Inc., respectively, for services rendered during the year 1927?

(2) Is the petitioner entitled to take as a deduction from income the amount of $20,000—legal expense incurred during the year 1927, or any portion thereof in 1927 or any other year here involved?

(3) What is the amount of community income earned by petitioner during the year 1927; and what portion thereof should be allocated to each spouse?

(4) Were the petitioners entitled to deduct from income as business expense, legal fees paid in the year 1929 in the amount of $1,336.06 in equal proportions on their respective separate returns for said year?

Petitioner resides with his wife, Bertha M. Kottemann, at Los Angeles, California, and is engaged in the practice of public accounting, being licensed to practice as a certified public accountant in the States of New York and California. Petitioner and his wife, during all of the years here involved, were living together and each spouse filed separate returns of income for each of the years 1927, 1928 and 1929 with the collector of Internal Revenue at Los Angeles, California. Subject to an exception hereinafter noted petitioner has kept his books of account and records on the accrual basis for all years, and the returns of both petitioner and his wife were filed on that basis.

[26] Petitioner was employed during the year 1927 to make an audit of the brokerage firm of A. C. Wagy & Company, Inc., a concern which was controlled by officers of the Julian Petroleum Corporation. On February 10, 1927 petitioner also obtained employment to make a complete audit of the capital stock records, stock books, stock transfer books, etc., of the Julian Petroleum Corporation. The income due petitioner as a result of this employment was placed on his books currently as it accrued and statements of the amounts due and owing from such sources were rendered to these two corporations accordingly. The audit of the Julian Petroleum Corporation was commenced on February 14, 1927 and was terminated May 16, 1927.

The audit made by petitioner disclosed that the stock of the Julian Petroleum Corporation had been over issued approximately six times that authorized by the State Corporation Commissioner of California. The over-issue was reported by petitioner to the District Attorney of Los Angeles County, the Board of Governors of the Los Angeles Stock Exchange, the State Corporation Department, the banks and the newspapers. Both the Julian Petroleum Corporation and the A. C. Wagy & Company, Inc. went into bankruptcy shortly after the over-issue was exposed in May, 1927.

At the close of the year 1927 there was due the petitioner from the Julian Petroleum Corporation $12,305.71 and from the A. C. Wagy & Company, Inc. $1,015.65 which had not been paid but had been accrued and which was reported as income on peti-

tioner's income tax return. [27] From May, 1927, to the end of the year petitioner made numerous attempts to collect these balances. By reason of his access to the books and records petitioner had personal knowledge of the financial condition of the two companies. Before the close of the year 1927 petitioner knew that numerous suits for attachment had been brought against both corporations; that receivers had been appointed and that the financial condition of both companies was such that they were hopelessly insolvent. Petitioner knew that the Julian Petroleum Corporation had substantial bank overdrafts and that the current assets amounted to only approximately 21 per cent of the unsecured liabilities. On May 20, 1927 there were current unsecured liabilities of $3,663,752.42 while the total current assets amounted to $1,177,748.07, making a deficiency of working capital of $2,486,004.35. In addition thereto there were secured liabilities totaling $5,737,688.18. The receivers reported that the current liabilities of the Julian Petroleum Corporation greatly exceeded the current assets; a one-half monthly payroll of $110,000 was due and its bank overdrafts exceeded $130,000; it had no banking or commercial credit.

Petitioner's efforts to collect the amounts due from these two corporations were of no avail. Before the close of the calendar year 1927 petitioner reasonably ascertained that the $12,305.71 due from the Julian Petroleum Corporation and the $1,015.65 from the A. C. Wagy & Company, Inc. for services so rendered were worthless and therefore wrote them

off his books as bad debts and took same as a deduction on his income tax return for that year.

[28] Petitioner filed claims with the receivers of both of these corporations, which were accepted and approved. After protracted litigation plans were formulated wherein each of the respective classes of creditors of the Julian Petroleum Corporation were to receive certain shares of stock of a reorganized corporation and certain of its bonds. The Judge of the Federal District Court in 1929 approved the plan and during the year 1930 petitioner received $6,900 par value debenture bonds of the Sunset Pacific Oil Company and a debenture trust certificate of the face value of $58.31 and 327 shares of Series "B" stock which were issued to him to cover the unpaid balance on his claim against the Julian Petroleum Corporation. The A. C. Wagy & Company, Inc. has never distributed anything to its creditors to date nor, according to the record, is there any likelihood of any distribution.

The stock and securities of the Sunset Pacific Oil Company had little or no value.

During the year 1929 petitioner received $3,110.25 from the Julian Petroleum Corporation for services rendered after the date of the receivership which was a part of the $12,305.71 charged off as a bad debt in 1927. This sum was reported as income in petitioner's 1929 income tax return.

We are satisfied that petitioner acted reasonably in charging off the debts due from the two companies in 1927. He was in a peculiarly advantage-

ous position to know the facts and the facts would have lead any reasonable man to do as he did. We approve the deduction of the two items for 1927.

[29] The second issue involves, in part, the same background. Petitioner, together with a large number of prominent people of the State of California (approximately 100) was indicted. Two charges were brought, one of conspiracy to violate the State Corporate Securities Act through the over-issuance of Julian Petroleum Corporation stock and the other to defraud the public through the sale of such stock. The indictment was issued against petitioner on June 24, 1927, and in order to defend himself he was compelled to employ attorneys to represent him. Under date of August 18, 1927, he entered into an agreement with the law firm of Scarborough & Bowen of Los Angeles, wherein he agreed to pay for their services the sum of $20,000. Petitioner paid under this contract $3,500 during the year 1927, $3,500 in the year 1928, and $6,500 in the year 1929. Petitioner took on his 1927 return a deduction from income of $3,500, on his 1928 return $3,500 and on his 1929 return the $6,500 paid during that year, as well as the accrual of the $6,500 still due under the contract. Petitioner was tried and acquitted as were all of the other defendants who were tried at that time.

We are convinced that respondent was in error in disallowing the deduction of the sums paid to the attorneys who defended petitioner against the indictment. Had petitioner not accepted the employment by Julian Petroleum Corporation the charges would not have been made nor the indictment found. As

events proved, petitioner was guilty of no wrongdoing. The case seems to come clearly within the decisions in *Kornhauser* v. *United States,* 276 U. S. 145; *Citron-Byer Co.,* 21 B. T. A. 308; *H. M. Howard,* 22 B. T. A. 375; *Matson Navigation Co.,* 24 B. T. A. 14.

[30] Although petitioner reported on the accrual basis he did not claim the entire sum agreed to be paid in 1927 by the terms of the contract, all of the $20,000 being due in that year, because he hoped to have part of the expense assumed by others and undertook negotiations to this end. That petitioner still retained hope that part of the expense would be so assumed in 1928 is evidenced by the fact that he did not accrue the entire sum for 1927. He deducted for 1927 and 1928 only the sums actually paid. In 1929 he deducted the remaining balance including $6,500 paid and a like amount accrued against future payment. In this last deduction we believe he erred. Having departed from the accrual basis as to this item of $20,000 and having employed the cash basis as to it for two years, he could not, at his election, go to the accrual basis in 1929. Such action would not accurately reflect income for that year as the indebtedness was not incurred in that year. The deduction of $6,500 accrued on petitioner's books but not paid is disallowed.

During the year 1927 petitioner earned from his accounting profession gross fees amounting to $121,-612.66. This amount included accruals indicated above of $12,305.71 from the Julian Petroleum Cor-

poration and $1,015.65 due from the A. C. Wagy & Company, Inc., which were written off as bad debts during the year. This gross income was reported on petitioner's return under Schedule A. The deductions incident to petitioner's business or profession are shown on Schedule A of his return, amounting to $87,000.09. Included in these deductions [31] are the sums of $3,500, legal fees paid to Scarborough & Bowen, bad debts of $12,305.71 referred to above due from Julian Petroleum Corporation, and the sum of $1,015.65 due from A. C. Wagy & Company, Inc. These figures and other figures consequent on the application of the conclusions announced herein will be given effect in making recomputations.

Petitioner and his wife divided the community income equally between them and each reported one-half of such community income on their separate returns for the years 1928 and 1929. For the year 1927 all of the community earnings were reported by the petitioner. In July, 1927 the Civil Code of California was amended giving the wife a vested interest in community earnings.

It was stipulated that a reasonable allocation of the community earnings allocable to petitioner's wife during the year 1927 is one-half of 5/12ths of the net income that the Board finds petitioner earned from professional services after allowing a reasonable return on investment used in his business. The balance should be allocated to the petitioner. The investment used in petitioner business is $12,000 and a reasonable return on this investment is 10 per cent.

In determining petitioner's income for the calendar year 1929, respondent disallowed $14,336.06, which sum included the balance due from the petitioner on the Scarborough & Bowen contract referred to above for legal services, in the amount of $13,000 in connection with the indictment, plus $1,336.06 covering legal fees paid to other attorneys.

[32] We have already indicated our holding as to the deductions for fees paid in connection with the indictment. The record establishes that the remaining item of $1,336.06 was paid in 1929 for services rendered in effecting collections, drawing agreements and such matters growing out of the business. It should be allowed.

Decisions will be entered under Rule 50.

[Seal]

Entered Mar 6 1934

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[33] United States Board of Tax Appeals

Docket No. 45929

WM. C. KOTTEMANN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to memorandum opinion of the Board entered March 6, 1934, the respondent in the above entitled proceeding filed a proposed recomputation

of the tax on April 3, 1934, and the case having been called for settlement on April 25, 1934, at which time no objection was offered to the proposed settlement, it is

ORDERED and DECIDED that there is an overpayment for the year 1927 in the amount of $986.21.

(Signed) ERNEST H. VAN FOSSAN
Member.

[Seal]

Entered Apr 27 1934

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[34] [Title of Court and Cause.]

[Endorsed]: Filed Jul 23 1934

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Wm. C. Kottemann, in support of this, his petition, filed in pursuance of the provisions of Section 1001 of the Act of Congress approved February 26, 1926, entitled "The Revenue Act of 1926", as amended by Section 603 of the Act of Congress approved May 29, 1928, entitled "The Revenue Act of 1928", and as further amended by Section 1101 of the Act of Congress approved June 6, 1932, entitled "The Revenue Act of 1932", for the review of the decision of the United States Board of Tax Appeals promulgated March 6, 1934, a final order of deter-

mination having been entered April 27, 1934, respectfully shows to this Honorable Court as follows:

I

STATEMENT OF THE NATURE OF THE CONTROVERSY.

BRIEF STATEMENT OF FACTS.

There is but one question presented in this appeal, namely, is the Petitioner entitled to take as a deduction from gross income for the year 1927 the entire amount of legal expenses incurred during that year in [35] the sum of $20,000.00, or is he limited to the amount actually paid during said year of $3,500.00.

The facts relative to this issue are as follows:

Petitioner resides with his wife, Bertha M. Kottemann, at Los Angeles, California, and is engaged in the practice of public accounting, being licensed to practice as a Certified Public Accountant in the States of New York and California. Petitioner and his wife were living together during the year 1927 and each filed separate returns of income for the year 1927 with the Collector of Internal Revenue at Los Angeles, California. Petitioner for all years has consistently kept his books of account and records on the accrual basis and the returns of Petitioner and his wife were filed on that basis.

Petitioner was employed during the year 1927 to make an audit of the brokerage firm of A. C. Wagy & Company, Inc., a corporation, which was controlled by officers of the Julian Petroleum Corporation. Be-

cause of the demand for an independent audit of the stock records of the Julian Petroleum Corporation made by the First National Bank and the Pacific Southwest Trust & Savings Bank of Los Angeles, Petitioner, on February 10, 1927, was employed to make a complete audit of the capital stock records, stock books, stock transfer books, etc. of said corporation. The income due Petitioner as a result of this employment was placed on his books currently as it accrued and statements of the amounts due and owing from such sources were rendered to these two corporations accordingly. The audit of the Julian Petroleum Corporation was commenced on February 14, 1927, and was terminated May 16, 1927.

The audit made by Petitioner disclosed that the stock of the Julian Petroleum Corporation had been overissued approximately six times the [36] amount authorized by the State Corporation Commissioner of California. The overissue was reported by Petitioner to the District Attorney of Los Angeles, California, the Board of Governors of the Los Angeles Stock Exchange, the State Corporation Department, the banks and the newspapers. Both the Julian Petroleum Corporation and the A. C. Wagy & Company, Inc. went into bankruptcy shortly after the overissue was exposed in May of 1927.

As a result of the disclosure of the large overissue of stock of the Julian Petroleum Corporation, in the spring of 1927 various and sundry investigations were instituted by the District Attorney's office, Grand Jury and other bodies, which resulted in the indictment of a large number (approximately

100) of prominent people of the State of California, including this Petitioner. Two charges were brought, one of conspiracy to violate the State Corporate Securities Act through the overissue of Julian Petroleum Corporation stock, and the other to defraud the public through the sale of such stock. The indictment was issued against this Petitioner on June 24, 1927, and in order to defend himself he employed the law firm of Scarborough and Bowen of Los Angeles, California. Under date of August 18, 1927, he entered into a written agreement wherein he agreed to pay these lawyers for their services the sum of $20,000.00.

The entire sum of $20,000.00, which Petitioner agreed to pay for legal services under the written contract, was all due and payable in 1927. However, Petitioner accrued only $3,500.00, which he paid during said year, and which he took as a deduction on his income tax return. During the year 1928 he paid an additional $3,500.00, which he accrued on his books and took as a deduction on his income tax return filed for that year. During the year 1929 an additional sum of $6,500.00 was paid, which sum Petitioner accrued on his books, together with the balance ($6,500.00) that was still [37] due and owing and took as a deduction on his return for said year 1929 the sum of $13,000.00.

Petitioner was tried and acquitted. Subsequently, District Attorney Asa Keyes, together with his associates, who caused the indictment of this Petitioner, and others, were indicted in connection with this fiasco and charged with accepting bribes. Mr.

Asa Keyes was convicted and served a term in San Quentin Prison. Although Petitioner kept his books and filed his returns on the accrual basis, he accrued only $3,500.00 of the $20,000.00 legal fee on his books in 1927 for the reason that during the latter part of said year he was negotiating with officers and attorneys of the First National Bank and the Pacific Southwest Trust & Savings Bank of Los Angeles with the hope that said banks would stand part of this legal expense. There were some temporary assurances that something would be allowed or paid by them; therefore, Petitioner was reluctant to take the entire deduction on his 1927 return, knowing that he could subsequently file amended returns to adjust this item. The banks declined to pay any portion of this legal expense.

Had Petitioner not accepted the employment to make an audit of the Julian Petroleum Corporation stock records, the charges would not have been made, nor the indictment found. A majority of Petitioner's income earned during said year and reported on his 1927 income tax return was fees earned and accrued on his books and records in connection with his professional duties as a Certified Public Accountant in making audits of the Julian Petroleum Corporation and the A. C. Wagy & Company, Inc. books.

The United States Board of Tax Appeals held that Petitioner was entitled to deduct from his gross income but $3,500.00 (the amount actually paid during 1927) of the $20,000.00 legal expenses incurred during the year 1927.

[38]

II

STATEMENT OF PROCEEDINGS HERETOFORE HELD.

The Commissioner of Internal Revenue, the Respondent herein, on August 7, 1929, mailed to Petitioner what is termed a deficiency letter, wherein the Commissioner proposed additional income taxes for the year 1927 in the sum of $2,878.63. Within the sixty day period, as provided by law, the Petitioner filed his appeal to the United States Board of Tax Appeals, wherein he alleged among other things that the Respondent erred in denying to Petitioner the right to treat as a proper business expense and as a deduction from his gross income the $20,000.00 agreed to be paid to the law firm indicated above, or any part thereof. As indicated above, the Board determined that Petitioner was entitled to take as a deduction in 1927 the sum of $3,500.00 only.

The Board's decision was promulgated on April 3, 1934, and its final order of determination was entered on April 27, 1934.

III

DESIGNATION OF COURT OF REVIEW.

Petitioner, being aggrieved by the said Opinion, Order and Decision, and being a resident of the City of Los Angeles, State of California, desires a review thereof, in accordance with the provisions of the Revenue Act of 1926, as amended by the

Revenue Act of 1928 and as further amended by the Revenue Act of 1932, by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue to which the said Petitioner made his Federal income tax return.

[39]

IV

ASSIGNMENTS OF ERROR.

Petitioner, as a basis of review, makes the following assignments of error:

1. The Board of Tax Appeals erred in failing to allow as a deduction from Petitioner's gross income for the year 1927 the entire sum of $20,000.00 legal fees incurred and which were due and payable during said year.

2. The Board of Tax Appeals erred in holding that Petitioner's items of income were all accruable but part of his items of expense was not accruable in computing Petitioner's taxable income.

3. If the Board of Tax Appeals is correct in its determination that only $3,500.00 of the $20,000.00 legal expenses incurred in 1927 was properly accruable, then the Board erred in failing to hold that Petitioner's other items of expense and all of his items of income should have been placed on the cash receipts and disbursements basis.

4. The Board of Tax Appeals erred in failing to determine that Petitioner was entitled to a refund of at least $2,319.79 in lieu of $878.06 as determined by said Board.

WHEREFORE, Petitioner prays that this Honorable Court may review the said findings, opinion, decision and order of the United States Board of Tax Appeals and reverse and set aside the same; and that this Honorable Court direct the entry of a decision by said Board in favor of Petitioner, determining that the entire legal expense of $20,000.00 incurred during the year 1927 was a proper deduction from income in determining the tax liability of this Petitioner. Petitioner further prays that this Honorable Court direct the Board to determine the amount of refund to be [40] $2,319.79 with interest, in lieu of the $878.06 determined by said Board and direct the Board to reverse its decision accordingly.

Petitioner prays for such other and further relief as may be meet and proper in the premises.

THOMAS R. DEMPSEY (Sgd)
A. CALDER MACKAY (Sgd)
ARTHUR McGREGOR (Sgd)
Counsel for Petitioner
1104 Pacific Mutual Building
Los Angeles, California.

[41]

State of California
County of Los Angeles—ss.

A. Calder Mackay, being duly sworn, says that he is one of the attorneys for the Petitioner above named and that as such is duly authorized to verify

the attached Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board rendered herein; that he has read the said Petition and is familiar with the statements therein contained, and that the facts set forth therein are true to the best of his knowledge and belief and that the said Petition is filed in good faith.

A. CALDER MACKAY.

Subscribed and sworn to before me this 21st day of July, 1934.

[Seal] LAURA TEETER (Sgd)
Notary Public in and for said
County and State.

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[42] [Title of Court and Cause.]

[Endorsed]: Filed Jul 23 1934

NOTICE

To Robert H. Jackson, Esq.,
Bureau of Internal Revenue,
Washington, D. C.,
Attorney for the Respondent.

Sir: Please take notice that on the 23rd day of July, 1934, the undersigned presented to this Board and filed with the Clerk thereof the Petition of Wm. C. Kottemann, a copy of which is annexed hereto, for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the final

order and decision of the Board in the above entitled proceeding entered upon the records of said Board on April 27, 1934.

Dated at Washington, D. C., July 23rd, 1934.

THOMAS R. DEMPSEY (Sgd)
A. CALDER MACKAY (Sgd)
ARTHUR McGREGOR (Sgd)
Attorneys for Petitioner
1104 Pacific Mutual Building
Los Angeles, California.

Service of a copy of the petition for review, together with notice of filing, is hereby acknowledged this 23rd day of July, 1934.

ROBERT H. JACKSON
Assistant General Counsel for the
Bureau of Internal Revenue.

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[43] [Title of Court and Cause.]

[Endorsed]: Filed Nov 19 1934

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and certify to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit within the time provided by the rules of that court in this respect, as extended, a transcript of record for review herein consisting of the following documents:

1. The docket entries of the proceedings before the United States Board of Tax Appeals.

2. All pleadings before the United States Board of Tax Appeals in this cause.

3. Memorandum Opinion and Decision of the Board.

4. Petition for Review and notice of filing, with acknowledgment of service.

5. This Praecipe.

THOMAS R. DEMPSEY (Sgd)
A. CALDER MACKAY (Sgd)
ARTHUR McGREGOR (Sgd)

Los Angeles, California, November 16th, 1934.

Service of a copy of the within Praecipe is hereby admitted this 19th day of November, 1934.

ROBERT H. JACKSON
Attorney for Respondent.

[Title of Court and Cause.]

CERTIFICATE

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 43, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 30th day of Nov., 1934.

[Seal]

B. D. GAMBLE
Clerk,
United States Board
of Tax Appeals.

[Endorsed]: Transcript of the Record. Filed December 28, 1934, Paul P. O'Brien, U. S. Circuit Court of Appeals for the Ninth Circuit.

No. 7727.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Wm. C. Kottemann,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

BRIEF FOR PETITIONER.

THOMAS R. DEMPSEY,
A. CALDER MACKAY,
ARTHUR MCGREGOR,
1104 Pac. Mut. Bldg., Los Angeles, Calif.
Attorneys for Petitioner.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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No. 7727.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Wm. C. Kottemann,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR PETITIONER.

HISTORY AND PREVIOUS OPINION.

The Commissioner of Internal Revenue, the Respondent herein, on August 7, 1929, mailed to Petitioner a deficiency letter wherein Respondent proposed additional taxes against Petitioner for the years 1926 and 1927 in the sum of $2,878.63. [R. pp. 19 to 23.]

Within the sixty-day period Petitioner filed his appeal with the United States Board of Tax Appeals, Docket No. 45,929 [R. pp. 4 to 19], [First Amended Petition, R. pp. 24 to 27], wherein he alleged that he had, during the year 1927, obligated himself to pay the sum of $20,000.00 to attorneys, and that such liability should be accrued and taken as a deduction in determining his net taxable income. On March 6, 1934, the Board of Tax Appeals promul-

gated its opinion [R. pp. 28 to 36] and held that although Petitioner reported on the accrual basis he was entitled only to the $3,500.00 actually paid inasmuch as that was the sum that was deducted upon Petitioner's return for that year. The final order of the Board of Tax Appeals was entered on April 27, 1934. [R. pp. 36, 37.]

Jurisdiction.

Petitioner resides at Los Angeles, California, and is engaged in the practice of public accounting, being licensed to practice as a certified public accountant in the States of New York and California. Petitioner and his wife, during the year 1927, were living together and each spouse filed separate returns of income for the year 1927 with the Collector of Internal Revenue at Los Angeles, California. [R. p. 29.]

The memorandum opinion of the Board of Tax Appeals was promulgated March 6, 1934. [R. pp. 28 to 36.]

The final order of the Board of Tax Appeals was entered April 27, 1934. [R. p. 37.]

Petitioner filed his petition for review by this Honorable Court with the Clerk of the United States Board of Tax Appeals on July 23, 1934. [R. pp. 37 to 45.] This appeal was taken pursuant to the provisions of Sections 1001, 1002 and 1003 of the Act of Congress approved February 26, 1926, entitled "The Revenue Act of 1926" (44 Stat. 1, 109, 110; U. S. C. A., Sections 1224, 1225, 1226), as amended by Section 603 of the Act of Congress approved May 29, 1928, entitled "The Revenue Act of 1928" (45 Stat. 873), and as further amended by Section 1101 of the Act of Congress approved June 6, 1932, entitled "The Revenue Act of 1932." (47 Stat. 286.)

Question Involved.

Is Petitioner entitled to take as a deduction from gross income for the calendar year 1927 the entire amount of legal expenses incurred during that year in the sum of $20,000.00, or is he limited to the amount actually paid during said year of $3,500.00?

Statutes Involved.

See Appendix, pages 19 to 25.

STATEMENT OF FACTS.

Petitioner resides at Los Angeles, California, and is engaged in the practice of public accounting, being licensed to practice as a certified public accountant in the States of New York and California. Petitioner and his wife were living together during the year 1927 and each filed separate returns of income for the year 1927 with the Collector of Internal Revenue at Los Angeles, California. Petitioner for all years has consistently kept his books of account and records on the accrual basis and the returns of Petitioner and his wife were filed on that basis.

Petitioner was employed during the year 1927 to make an audit of the brokerage firm of A. C. Wagy & Company, Inc., a corporation, which was controlled by officers of the Julian Petroleum Corporation. Because of the demands for an independent audit of the stock records of the Julian Petroleum Corporation made by the First National Bank and the Pacific-Southwest Trust & Savings Bank of Los Angeles, Petitioner, on February 10, 1927, was employed to make a complete audit of the capital stock records, stock books, stock transfer books, etc. of said corporation. The

income due Petitioner as a result of this employment was placed on his books currently as it accrued and statements of the amounts due and owing from such sources were rendered to these two corporations accordingly. The audit of the Julian Petroleum Corporation was commenced on February 14, 1927, and was terminated May 16, 1927.

The audit made by Petitioner disclosed that the stock of the Julian Petroleum Corporation had been over-issued approximately six times the amount authorized by the State Corporation Commissioner of California. The over-issue was reported by Petitioner to the District Attorney of Los Angeles, California, the Board of Governors of the Los Angeles Stock Exchange, the State Corporation Department, the banks and the newspapers. Both Julian Petroleum Corporation and A. C. Wagy & Company, Inc. went into bankruptcy shortly after the overissue was exposed in May of 1927.

As a result of the disclosure of the large over-issue of stock of the Julian Petroleum Corporation, numerous investigations were instituted in the spring of 1927 by the District Attorney's office, Grand Jury and other bodies, which resulted in the indictment of a large number (approximately 100) of prominent people of the State of California, including this Petitioner. Two charges were brought, one of conspiracy to violate the State Corporate Securities Act through the over-issue of Julian Petroleum Corporation stock, and the other to defraud the public through the sale of such stock. The indictment was issued against this Petitioner on June 24, 1927, and in order to defend himself he employed the law firm of Scarborough and Bowen of Los Angeles, California. Under date of August 18, 1927, he entered into a written agreement wherein he agreed to pay these lawyers

for their services the sum of $20,000.00. The entire sum was due and payable in 1927. However, Petitioner entered on his books only $3,500.00 which he paid during said year, and which he took as a deduction on his income tax return. During the year 1928 he paid an additional $3,500.00, which he accrued on his books and took as a deduction on his income tax return filed for that year. During the year 1929 an additional sum of $6,500.00 was paid, which sum Petitioner accrued on his books, together with the balance ($6,500.00) that was still due and owing and took as a deduction on his return for said year 1929 the sum of $13,000.00.

Petitioner was tried and acquitted. Subsequently, District Attorney Asa Keyes together with his associates, who caused the indictment of this Petitioner, and others, were indicted in connection with this fiasco and charged with accepting bribes. Mr. Asa Keyes was convicted and served a term in San Quentin Prison. Although Petitioner kept his books and filed his returns on the accrual basis, he accrued only $3,500.00 of the $20,000.00 legal fee on his books in 1927 for the reason that during the latter part of said year he was negotiating with officers and attorneys of the First National Bank and the Pacific-Southwest Trust & Savings Bank of Los Angeles with the hope that said banks would stand part of this legal expense. There were some temporary assurances that something would be allowed or paid by them; therefore, Petitioner was reluctant to take the entire deduction on his 1927 return, knowing that he could subsequently file an amended return to adjust this item. The banks declined to pay any portion of this legal expense.

Had Petitioner not accepted the employment to make an audit of the Julian Petroleum Corporation stock rec-

ords, the charges would not have been made, nor the indictment found. A major part of Petitioner's income earned during said year and reported on his 1927 income tax return was fees earned and accrued on his books and records in connection with his professional duties as a certified public accountant in making the audits of the books of Julian Petroleum Corporation and A. C. Wagy & Company, Inc. The United States Board of Tax Appeals held that Petitioner was entitled to deduct from his gross income only $3,500.00 (the amount actually paid during 1927) of the $20,000.00 legal expenses incurred during the year 1927.

ASSIGNMENTS OF ERROR.

Petitioner relies upon the assignments of error set forth in his petition for review which are as follows:

1. The Board of Tax Appeals erred in failing to allow as a deduction from Petitioner's gross income for the year 1927 the entire sum of $20,000.00, legal fees incurred and which were due and payable during said year.

2. The Board of Tax Appeals erred in holding that Petitioner's items of income were all accruable, but part of his items of expense was not accruable in computing Petitioner's taxable income.

3. If the Board of Tax Appeals is correct in its determination that only $3,500.00 of the $20,000.00 legal expenses incurred in 1927 was properly accruable, then the Board erred in failing to hold that Petitioner's other items of expense and all of his items of income should have been placed on the cash receipts and disbursements basis.

4. The Board of Tax Appeals erred in failing to determine that Petitioner was entitled to a refund of at least $2,319.79 in lieu of $878.06 as determined by said Board.

LAW AND ARGUMENT.

Petitioner Is Entitled to Take as a Deduction From Taxable Income for the Year 1927 the Amount of Legal Expenses Accrued and Incurred During That Year in the Sum of $20,000.00.

The amount of Petitioner's liability to his attorneys, Messrs. Scarborough and Bowen, in the amount of $20,000.00, is undisputed, and it is admitted that the legal fees are deductible.

The only question presented in this appeal is whether or not the Petitioner is entitled to take as a deduction from gross income the entire sum of $20,000.00 representing legal expenses incurred during the year 1927 to defend himself against indictment or whether he is limited to the sum of $3,500.00 actually paid during said year.

Petitioner for all years has consistently kept his books of account and records on the accrual basis and income tax returns of Petitioner and his wife were filed on that basis. During the year 1927 Petitioner was employed to make an audit of the brokerage firm of A. C. Wagy & Company, Inc., a corporation which was controlled by officers of the Julian Petroleum Corporation. He was also employed to make an independent audit of the stock records of the Julian Petroleum Corporation. The income due Petitioner as the result of the employment was placed on his books currently as it accrued and statements of the amounts due and owing Petitioner from such sources were rendered to these two corporations accordingly. The audit made by Petitioner showed that the stock of the Julian Petroleum Corporation had been over-issued approximately six times the amount authorized by the State Corporation Commissioner of the State of California and by reason of the

disclosure of the large over-issue numerous investigations were instituted by the District Attorney's office, Grand Jury and other bodies which resulted in a large number (approximately 100) of prominent people of the State of California, including this Petitioner, being indicted. Two charges were brought, one of conspiracy to violate the State Corporate Securities Act through the over-issue of Julian Petroleum Corporation stock and the other to defraud the public through the sale of such stock. The indictment was issued against Petitioner on June 24, 1927, and in order to defend himself he employed the law firm of Scarborough and Bowen, of Los Angeles, California. Under date of August 18, 1927, he entered into a written agreement wherein he agreed to pay these lawyers for their services the sum of $20,000.00. The entire sum of $20,000.00 under this contract was all due and payable in 1927. Petitioner entered only $3,500.00 on his books which he paid during said year and only $3,500.00 was taken as a deduction upon his 1927 income tax return.

Petitioner was tried and acquitted. Subsequently, the District Attorney, Asa Keyes, together with his associates, who caused the indictment of this Petitioner and others, were indicted in connection with this fiasco and charged with accepting bribes. Keyes was convicted and served a term in San Quentin prison. Although Petitioner kept his books and filed his income tax returns on the accrual basis he accrued only $3,500.00 of the $20,000.00 legal fees on his books in 1927 for the reason that during the latter part of said year he was negotiating with officers and attorneys of the First National Bank and the Pacific-Southwest Trust & Savings Bank with the hope that said banks would stand part of the legal expense. There were some temporary assurances that something would be al-

lowed or paid by them, therefore, Petitioner was reluctant to take the entire deduction on his 1927 return, knowing that he could subsequently file an amended return to adjust this item. The banks declined to pay any portion of this legal expense.

A major part of Petitioner's income earned during the year and reported on his 1927 income tax return was fees earned and accrued on his books in connection with his professional duties as a certified public accountant in making audits of the books of Julian Petroleum Corporation and its subsidiary, A. C. Wagy & Company, Inc.

It is apparent from the record that Petitioner was a victim of unwarranted prosecution and was indicted to be kept from testifying (a co-conspirator cannot testify against another co-conspirator). The Board of Tax Appeals in its opinion [R. p. 33] found that Respondent was in error in disallowing the deduction of the sums paid to the attorneys who defended the Petitioner against indictment, stating:

> "* * * Had Petitioner not accepted the employment by Julian Petroleum Corporation the charges would not have been made nor the indictment found. As events proved, Petitioner was guilty of no wrongdoing. The case seems to come clearly within the decisions in *Kornhauser v. United States*, 276 U. S. 145; *Citron-Byer Co.*, 21 B. T. A. 308; *H. M. Hoeard*, 22 B. T. A. 375; *Matson Navigation Co.*, 24 B. T. A. 14."

The Board of Tax Appeals held, however, that Petitioner was entitled to deduct from his gross income for 1927 only $3,500.00, the amount actually paid in 1927. In this, Petitioner respectfully submits the Board erred by not allowing the entire $20,000.00.

Where a taxpayer is on the accrual basis the creation of a true account payable means a deduction. Assuming the item is otherwise deductible, the payable is treated as equivalent to an actual disbursement. *Rouss v. Bowers,* 30 Fed. 2d, 628 (C. C. A., 2d, 1929), Cert. Den., 279 U. S. 853, 73 L. Ed. 995, 49 Supreme Court 348 (1929). See A. R. R. 4831, C. B. III-1, p. 126; IT 1891, C. B. III-1, p. 132; IT 1272, C. B. I-1, p. 123.

Accrual of an item is a question of fact. The Board of Tax Appeals in its opinion found that Petitioner kept his books on the accrual method of accounting, subject to this one exception pertaining to legal fees incurred. The accrual system is based upon the principle that normally business obligations are in due course discharged. The theory of the method is that at the end of any accounting period all income which has been earned during the period must be accounted for as income accrued in that period, though perhaps not collected, because it is not due in the sense of collection and will not be collected until some future date and that all expenses incurred, though not paid, will be taken as a deduction in determining net income. The word "accrued" does not signify that an item is due in the sense of being payable; the accrual system disregards dates of payment (*H. H. Brown Co.,* 8 B. T. A. 112), making the right to receive and not actual receipt decisive. *Spring City Foundry Co. v. Commissioner,* 291 U. S. 656, 54 S. Ct. 527 (1934).

As long as a contract remains unbreached, the taxpayer should accrue his income receivable thereunder; the same would be true from the converse point of view with respect to deductions. Under whatever system the taxpayer makes his return the items of income and deductible expenses

must have relation to the business done within the year for which the income tax is paid. The same principles should control whether an item of income is accruable as determine whether an item of deduction is accruable. (Law of Federal Income Taxation, Vol. 1, p. 561, Paul and Mertens). One court has stated that "As to both income and deductions it is the fixation of the rights of the parties that is controlling." *Commissioner v. R. J. Darnell, Inc.*, 60 F. (2d) 82, C. C. A. 6th, 1932; *Commissioner v. Southeastern Express Co.*, 56 F. (2nd), 600 (C. C. A. 5th, 1932); *Higgins Estate*, 30 B. T. A. 814.

This statement reflects specifically a general rule which appears again and again in many decisions. Whenever a rule is given as to the accrual of income the counterpart usually appears as to deductions. Since so many recipients of fees, salaries, wages and other compensation keep their books on the accrual basis it is most important to determine when such items may be taken as an incurred deductible expense. The general rule is clear that such payments are deductible only in the year in which a fixed liability or obligation to pay is created and should relate to the income earned. The signed contract of this Petitioner certainly fixed the liability which Petitioner was bound to pay. Further, the services rendered by the attorneys had a direct bearing upon the earnings of Petitioner from the Julian Petroleum Corporation during the year 1927. It would distort Petitioner's income for 1927 unless such expense (which was part of the expense of earning and retaining the income reported by Petitioner in 1927) was allowed as a deduction. Such expense had no relation to any income subsequently earned by this Petitioner.

Unpaid liabilities may be deducted only by taxpayers on the accrual basis and they should be deducted in the year the liability is incurred. *Charles J. Kelly Estate,* 8 B. T. A. 296; *Louis de Paoli Estate,* 8 B. T. A. 294; *John E. Frymier,* 5 B. T. A. 758. The basic test whether an expense item may be accrued lies in the question whether liability is fixed. *Lucas v. American Code Co.,* 280 U. S. 445, 50 S. Ct. 202; *Brighton Mills,* 1 B. T. A. 392; *Ledbetter Manufacturing Co.,* 12 B. T. A. 145; *Adams-Roth Baking Co.,* 8 B. T. A. 458. The mere fact that a properly accrued liability is not subsequently paid does not preclude deductibility in the year of accrual if there is in the year of accrual a definite liability; thus an amount accrued and paid in 1920, as an insurance premium is a proper deductible expense of 1920 even though refunded in the following year on the cancellation of the contract. *Cohn Co.,* 12 B. T. A. 1281.

Where a petitioner's income is computed on the accrual basis obligations for legal expenses properly coming within the classification of business expense and definitely incurred in the taxable year are deductible. *U. S. v. Anderson,* 269 U. S. 422. In the case of *Searles Real Estate Trust v. Commissioner,* 25 B. T. A. 1115, the Board held that where legal expenses were incurred during the years in question for professional services rendered by an attorney and such services were connected with the earnings, such items were a proper deduction from income where income was computed on the accrual basis even though the bills were not paid because there was no available money.

Importance is sometimes attached to book entries in connection with the deductibility of accrued compensation. The book entries are evidentiary but not controlling.

Savinir Co., Inc., 9 B. T. A. 465; *Oconto Falls Motor Car Co.*, 18 B. T. A. 840; *F. J. Ross Co., Inc.*, 7 B. T. A. 196; *Henry Myer Thread Manufacturing Co.*, 2 B. T. A. 665. When it is shown that a liability for additional compensation accrued during the year it is a deduction for that year though not entered on the books or paid until a subsequent year. *Wedgewood & Sons, Ltd.*, 3 B. T. A. 355. The facts and not bookkeeping entries control in the determination of the question whether an item is income or deductible on the accrual basis. *Michigan Central Railroad Co.*, 28 B. T. A. 437; *Permanent Homes Land Co.*, 27 B. T. A. 142; *Corn Exchange Bank*, 6 B. T. A. 158. If a genuine liability has been created, or the identifiable events have occurred which give rise to liability, there will be a deductible item even though there is no entry on the books until the subsequent period. *Wolf Manufacturing Co.*, 10 B. T. A. 1161; *Borden Manufacturing Co.*, 6 B. T. A. 276.

Section 1101 of the Revenue Act of 1926 states that "The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act."

Article 23 of Regulations 69, in interpreting the provisions of the Revenue Act of 1926, suggests that the computation of taxable net income must be based on a system of accounting whereby all items of gross income and all deductions are treated with reasonable consistency.

Section 200 (d) of the Revenue Act of 1926 and Article 1523 of Regulations 69 make it clear that deductions must be taken for the taxable year in which "paid or accrued" or "paid or incurred," unless in order to clearly reflect the income such income or credits should be taken in a dif-

ferent period. It would certainly not reflect the true income of this Petitioner to take an expense incident to the earning of his fees from the Julian Petroleum Corporation in 1927 and deduct it in later years when paid inasmuch as all of the income received by this Petitioner due to such employment was reported on the accrual basis in 1927.

Since the passage of the first Income Tax Act in 1913 the Commissioner's Regulations interpreting the law provide for two principal bases for determining net taxable income, and upon which the books shall be kept and returns shall be filed. One of these is the accrual basis and the other is the cash receipts and disbursements basis. They do not provide for any mixture of the two bases. As a matter of fact, permission must be secured to change from one basis to the other. In all cases, costs and expenses which are directly comparable to the income for a period, should be included in the same period. Clearly, the purpose is to reflect the true net income respecting the period to which they apply. Obviously, where a taxpayer is on the accrual basis, commissions paid for the purpose of making a sale should properly be deductible during the period when the income from the sale is taken into account and returned as income.

In the case at bar, there was a substantial gross income during the particular period, and obviously, an expense directly applicable to that gross income should, therefore, be deductible during the same period in which the gross income was taken into account. Only by such a process can the true net income of the taxpayer be correctly reflected. That is the only fair way to determine true income.

In the case of this Petitioner, his books, records and income tax returns have consistently been on an accrual basis over a period of many years, and if the item at issue had been set up on the books during the year in which it was incurred and in which it accrued, this issue would not probably have arisen, but the reason why it was not set up on the books at that particular time has been referred to previously in this brief and is entered in the testimony of this case. The omission of that item was deliberate on the part of the Petitioner, solely because of his desire to be fair in the filing of his return and not to take advantage of his full rights in reporting his net taxable income, but rather reserving the doubt in the favor of the government pending the completion of the negotiations which were then in process relative to the bank's standing at least a part of the said legal expense. It seems unfair that Petitioner should now be penalized because of his willingness to construe all doubts in favor of the government until such doubts were cleared up. He anticipated amending his 1927 return after negotiations were completed.

In Article 112, Regulations 69, the Commissioner of Internal Revenue recognizes the right of each taxpayer to file amended returns and claim deductions for losses sustained during a prior taxable year which has not been deducted from gross income, and claim a refund of the excess tax paid by reason of the failure to deduct such loss in the original return.

If the Board of Tax Appeals is correct in its determination that only $3,500.00 of the $20,000.00 legal expenses incurred in 1927 was properly deductible, then the Board erred in failing to hold that Petitioner's other items of expense and all of his items of income should have been placed upon the cash receipts and disbursements basis.

It is submitted that the evidence conclusively shows that the liability was fixed, and inasmuch as Petitioner had consistently kept his books and filed his returns on the accrual basis the entire sum must be allowed as a deduction in order to show Petitioner's true net income. Petitioner, therefore, prays that this Court determine that he is entitled to take as a deduction for the year 1927 the entire $20,000.00 legal expense incurred during said year in lieu of the $3,500.00 actually paid.

Respectfully submitted,

THOMAS R. DEMPSEY,
A. CALDER MACKAY,
ARTHUR MCGREGOR,
Attorneys for Petitioner.

1104 Pac. Mut. Bldg., Los Angeles, Calif.

APPENDIX.

Revenue Act of 1926.

Section 200 (d):

"The terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under section 212 or 232. The deductions and credits provided for in this title shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' dependent upon the method of accounting upon the basis of which the net income is computed under section 212 or 232, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period."

Section 212 (b):

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *"

Section 214 (a) (1):

"(a) In computing net income there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *"

Section 1101:

"The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act."

Regulations 69:

"Art. 21. Meaning of net income.—The tax imposed by the statute is upon income. In the computation of the tax various classes of income must be considered:

"(a) Income (in the broad sense), meaning all wealth which flows in to the taxpayer other than as a mere return of capital. It includes the forms of income specifically described as gains and profits, including gains derived from the sale or other disposition of capital assets. Cash receipts alone do not always accurately reflect income, for the statute recognizes as income-determining factors other items, among which are inventories, accounts receivable, property exhaustion, and accounts payable for expenses incurred. (See sections 202-205, 208, 213, and 214 and the articles thereunder.)

"(b) Gross income, meaning income (in the broad sense) less income which is by statutory provision or otherwise exempt from the tax imposed by the statute. (See section 213 and articles 31-93.)

"(c) Net income, meaning gross income less statutory deductions. The statutory deductions are in general, though not exclusively, expenditures, other than capital expenditures, connected with the production of income. (See sections 206, 214, and 215 and the articles thereunder.)

"(d) Net income less credits. (See section 216 and articles 301-306.)

"The surtax is imposed upon net income; the normal tax upon net income less credits. Although taxable net income is a statutory conception, it follows, subject to certain modifications as to exemptions and as to deductions for partial losses in some cases, the lines of commercial usage. Subject to these modifications statutory 'net income' is commercial 'net income.' This appears from the fact that ordinarily it is to be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer. As to the net income of corporations, see section 232 and article 531."

"Art. 22. Computation of net income.—Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditures which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as to which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See articles 50-52.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it."

"Art. 23. Bases of computation.—Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. See section 200 for definitions of 'paid or accrued' and 'paid or incurred.' All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. (See sections 200(d) and 213 (a).) For instance, in any case in which it is necessary to use an inventory, no accounting in regard to purchases and sales will correctly reflect income except an accrual method. A taxpayer is deemed to have received items of gross income which have been credited to or set apart for him without restriction. (See articles 51 and 52.) On the other hand, appreciation in value of property is not even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property. (But see article 1615.)

The true income, computed under the Revenue Act of 1926 and, where the taxpayer keeps books of account, in accordance with the method of accounting regularly employed in keeping such books (provided the method so used is properly applicable in determining the net income of the taxpayer for purposes of taxation), shall in all cases be entered in the return. If for any reason the basis of reporting income subject to tax is changed, the taxpayer shall attach to his return a separate statement setting forth for the taxable year and for the preceding

year the classes of items differently treated under the two systems, specifying in particular all amounts duplicated or entirely omitted as the result of such change.

A taxpayer who changes the method of accounting employed in keeping his books for the taxable year 1925 or thereafter should, before computing his income upon such new basis for purposes of taxation, secure the consent of the Commissioner. Application for permission to change the basis of the return shall be made at lease 30 days before the close of the period to be covered by the return and shall be accompanied by a statement specifying the classes of items differently treated under the two systems and specifying all amounts which would be duplicated or entirely omitted as a result of the proposed change.

Section 212 (d) contains special provisions for reporting the profit derived from the sale of property on the installment plan. (See articles 42-46.)"

"Art. 24. Methods of accounting.—It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so. (See section 1102 and article 1321.) * * *"

"Art. 101. Business expenses.—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 121-261. * * *"

"Art. 112. When charges deductible.—Each year's return, so far as practicable, both as to gross income and deductions therefrom, should be complete in itself, and taxpayers are expected to make every reasonable effort to ascertain the facts necessary to make a correct return. (See articles 21-24 and 50.) The expenses, liabilities, or deficit of one year can not be used to reduce the income of a subsequent year. (But see section 206 and articles 1621-1626.) A taxpayer has the right to deduct all authorized allowances, and it follows that if he does not within any year deduct certain of his expenses, losses, interest, taxes, or other charges, he can not deduct them from the income of the next or any succeeding year. It is recognized, however, that particularly in a going business of any magnitude there are certain overlapping items both of income and deduction, and so long as these overlapping items do not materially distort the income they may be included in the year in which the taxpayer, pursuant to a consistent policy, takes them into his accounts. Judgments or other binding adjudications, such as decisions of referees and boards of review under workmen's compensation laws, on account of damages for patent infringement, personal injuries, or other cause, are deductible from gross income when the claim is so adjudicated or paid, unless taken under other methods of accounting which clearly reflect the correct deduction, less any amount of such damages as may have been compensated for by insurance or otherwise. If subsequent to its occurrence, however, a taxpayer first ascertains the amount of a loss sustained during a prior taxable year which has not been deducted from gross income, he may render an amended return for such preceding taxable year including such amount of loss in the deductions from gross income and may file a claim for re-

fund of the excess tax paid by reason of the failure to deduct such loss in the original return. (See section 284 and articles 1301-1306.) A loss from theft or embezzlement occurring in one year and discovered in another is ordinarily deductible for the year in which sustained.

"Art. 1523. 'Taxable year,' 'withholding agent,' 'paid or incurred,' and 'paid or accrued.'—* * * The terms 'paid or incurred' and 'paid or accrued' will be construed according to the method of accounting upon the basis of which the net income is computed by the taxpayer. The deductions and credits provided for in Title II must be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' unless in order clearly to reflect the income such deductions or credits should be taken as of a different period. If a taxpayer desires to claim a deduction or a credit as of a period other than the period in which it was 'paid or accrued' or 'paid or incurred,' he shall attach to his return a statement setting forth his request for consideration of the case by the Commissioner together with a complete statement of the facts upon which he relies. However, in his income tax return he shall take the deduction or credit only for the taxable period in which it was actually 'paid or incurred,' or 'paid or accrued,' as the case may be. Upon the audit of the return, the Commissioner will decide whether the case is within the exception provided by the statute, and the taxpayer will be advised as to the period for which the deduction or credit is properly allowable.

No. 7727

In the United States Circuit Court of Appeals for the Ninth Circuit

WILLIAM C. KOTTEMANN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The sole previous opinion in this case is the unpublished memorandum opinion which was rendered by the Board of Tax Appeals on March 6, 1934 (R. 28–36).

JURISDICTION

This petition for review involves income taxes for the year 1927, and is taken from the decision of the Board of Tax Appeals entered on April 27, 1934 (R. 36–37). The case is brought to this Court

by petition for review filed July 23, 1934 (R. 37–45), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTION PRESENTED

Whether under the circumstances present in this case the petitioner is entitled to a deduction for the year 1927 of the entire amount of a $20,000 attorney fee contracted in that year, or whether he is limited to the deduction of only $3,500 thereof actually accrued and paid during said year.

STATUTE AND OTHER AUTHORITIES INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, provides in part as follows:

> SEC. 200. When used in this title—
>
> * * * * *
>
> (d) The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under section 212 or 232. The deductions and credits provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed under section 212 or 232, unless in order to clearly reflect the income the deductions or credits should be taken as of a differ-

ent period. * * * (U. S. C. App., Title 26, Sec. 931.)

SEC. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * * (U. S. C. App., Title 26, Sec. 953).

SEC. 214. (a) In computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *. (U. S. C. App., Title 26, Sec. 955.)

The Rules of Practice of the Board of Tax Appeals provide in part as follows:

RULE 5.—INITIATION OF A PROCEEDING—PETITION.

A proceeding shall be initiated by filing with the Board a petition * * *. It shall contain:

* * * * *

(d) Clear and concise assignments of error alleged to have been committed by the Commissioner. Such assignments of error shall be numbered.

* * * * *

(f) A prayer, setting forth relief sought by the petitioner.

* * * * *

STATEMENT

The memorandum opinion of the Board discloses that it was a single opinion rendered in five separate proceedings, brought separately by two taxpayers for the redetermination of their respective deficiencies, for different years, as follows (R. 28):

> William C. Kottemann (the petitioner in the present appeal) had brought proceedings to redetermine deficiencies as indicated below:
>
> | B. T. A. Docket No.— | |
> |---|---|
> | 45929 | 1927 |
> | 61238 | 1928 |
> | 61239 | 1929 |
>
> Bertha M. Kottemann, his wife, had brought proceedings to redetermine deficiencies as follows:
>
> | B. T. A. Docket No.— | |
> |---|---|
> | 61240 | 1928 |
> | 61241 | 1929 |

Pursuant to its memorandum opinion the Board entered separate final decisions in each of the five proceedings, and in B. T. A. Docket No. 45929 found that there was an overpayment for the year 1927 in the amount of $986.21 [1] (R. 36–37).

William C. Kottemann, by his petition for review herein, has appealed to this Court from the separate decision entered by the Board in Docket No. 45929 involving the year 1927. The present

[1] The petitioner both in his petition for review (R. 43, 44) and in his brief (p. 8) refers to the amount of overpayment for 1927 found by the Board as $878.06, while from the record (p. 37) the correct amount appears to be $986.21.

appeal therefore involves only the one proceeding, B. T. A. Docket No. 45929, for the redetermination of the deficiency against him for the year 1927 (R. 37–45).

Insofar as material to the present appeal, the facts may be stated briefly as follows, from the findings made by the Board:

The petitioner, a resident of Los Angeles, California, was for many years before and after 1927 engaged in the practice of public accounting, being licensed as a certified public accountant in the States of New York and California. Except as hereinafter noted, he kept his books of account and records, and filed his income tax returns on the accrual basis (R. 29).

During the year 1927 petitioner was employed to make an audit of the brokerage firm of A. C. Wagy & Company, Inc., and of the capital stock records, stock books, etc., of the Julian Petroleum Corporation. The income due petitioner as a result of this employment was placed on his books currently as it accrued, and statements of the amounts due and owing from such sources were rendered to these two corporations accordingly. The audit of the Julian Petroleum Corporation was commenced on February 14, 1927, and was terminated on May 16, 1927 (R. 30).

The audit made by petitioner disclosed that the stock of Julian Petroleum Corporation had been overissued approximately six times, and shortly

after this exposure both corporations went into bankruptcy (R. 30).

Thereafter, petitioner, together with a large number of prominent people of the State of California (approximately 100), was indicted. Two charges were brought, one of conspiracy to violate the State Corporate Securities Act through the overissuance of Julian Petroleum Corporation stock, and the other to defraud the public through the sale of such stock. The indictment was issued against petitioner on June 24, 1927, and in order to defend himself he was compelled to employ attorneys to represent him. Under date of August 18, 1927, he entered into an agreement with the law firm of Scarborough & Bowen, of Los Angeles, wherein he agreed to pay for their services the sum of $20,000 (R. 33).

Petitioner paid under this contract $3,500 during the year 1927, $3,500 in the year 1928, and $6,500 in the year 1929. Petitioner took on his 1927 return a deduction of $3,500, on his 1928 return $3,500, and on his 1929 return the $6,500 paid during that year, as well as the accrual of the $6,500 still due under the contract. Petitioner was tried and acquitted, as were all of the other defendants who were tried at that time (R. 33).

Although petitioner reported on the accrual basis, he did not in 1927 accrue the entire sum of $20,000 agreed to be paid under the contract, because he hoped to have part of the expenses assumed by others and undertook negotiations to this

end. In 1927 and 1928 he accrued and claimed as deductions only the sums actually paid, $3,500 in each year. In 1929 he deducted $6,500 paid in that year, and also accrued and deducted the unpaid balance of $6,500 (R. 34).

The Commissioner disallowed the deduction of $3,500 legal fees claimed for 1927 (as well as the deductions claimed in the other years) on the ground that the legal fees were paid for defending taxpayer, who was under indictment, and were therefore a personal expense (R. 22–23).

The petitioner appealed separately to the Board of Tax Appeals from the determination of the Commissioner for each of the three years in question. Other issues were presented to the Board in the three appeals by petitioner and in the two by his wife, and decided by the Board in its opinion, but they are not relevant to this appeal and need therefore not be referred to. On the question of the deductions of legal fees the Board held that the Commissioner had erred in disallowing the deductions for the sums of $3,500, $3,500, and $6,500 accrued and paid in the years 1927, 1928, and 1929, respectively. The Board further held that the petitioner had erred in claiming the deduction for the balance of $6,500 which he had accrued but not paid in 1929 (R. 33–34).

The petitioner appeals to this Court from the Board's decision in Docket No. 45929, which as has been seen concerns only the year 1927, and urges that the Board erred in holding that he was entitled

to deduct only $3,500 in 1927 on account of the legal fees in question, and asserts now that he was entitled to deduct the entire $20,000 in the year 1927.

SUMMARY OF ARGUMENT

This appeal involves only the redetermination of the deficiency asserted against petitioner for the year 1927. In his return for 1927, petitioner claimed a deduction of $3,500 for legal fees which he had accrued and paid in that year. The Commissioner disallowed this deduction, and the petitioner appealed to the Board, asserting that the Commissioner erred in disallowing "as a deduction from his gross income the amount of certain legal fees paid by him" in 1927 (R. 5). The Board reversed the Commissioner and allowed the deduction of $3,500 for 1927. By the decision of the Board, therefore, the petitioner obtained all the relief for which he prayed; he obtained all that he had sought in his appeal to the Board concerning the 1927 deficiency. His petition for review to this Court now raises a new issue, and seeks additional relief, by claiming that he was entitled to deduct the entire $20,000 in 1927. This issue, not having been raised below, but being now raised for the first time on appeal, cannot be considered by this Court, and the decision of the Board should therefore be affirmed.

In addition to the foregoing, the decision of the Board should be upheld on the ground of equitable estoppel, or estoppel *in pais*.

ARGUMENT

As has been indicated, the present appeal is taken from the decision of the Board in Docket No. 45929, which involves the redetermination of the deficiency asserted against petitioner for the taxable year 1927. The record before the Court shows conclusively that the issue presented before the Board in this case (omitting, of course, the mention of other issues not relevant to the present appeal) was whether or not the petitioner was entitled to the deduction claimed by him in 1927 of the sum of $3,500 for legal fees which he had accrued and paid in that year. The record establishes indisputably that the case before the Board did not involve or present the issue of whether or not the petitioner was entitled to accrue the entire $20,000 legal fees in 1927, and that this issue is raised and presented *for the first time* in the appeal to this Court by the petition for review.

Tracing the history of this proceeding back to its very inception, it will be seen first that the return filed by William C. Kottemann for the taxable year 1927 asserted a claim to a deduction of the sum of $3,500 accrued and paid by the taxpayer in that year on account of the legal fees herein involved. The next step is the action of the Commissioner, who, in determining a deficiency in tax for the year 1927 against William C. Kottemann, disallowed this deduction of $3,500 claimed by the taxpayer, stating in his letter giving notice of the deficiency

that the legal fees paid were disallowed because the Commissioner regarded them as a personal expense. Next we find that the taxpayer appealed from that determination of a deficiency for the year 1927, by a petition to the Board of Tax Appeals, being Docket No. 45929.

In that petition to the Board the taxpayer asserted that in determining the deficiency (R. 5):

> (a) The commissioner has erred in denying to the taxpayer the right to treat as a proper business expense and as a deduction from his gross income the amount of certain legal fees paid by him.
>
> (b) The Commissioner has further erred in alleging that such legal expense was not a proper business deduction.
>
> (c) The Commissioner has further erred in disallowing the deduction of that legal expense by not taking into consideration all of the facts, circumstances, and conditions directly or indirectly associated or connected with that expenditure for legal expense.

The foregoing are all the assignments of error set forth in the petition to the Board on the subject of the legal fees. Other assignments pertain to other matters and need not be mentioned here.

We find next the memorandum opinion of the Board, and its subsequent decision pursuant thereto. The Board stated that the Commissioner was in error in disallowing the deduction of the sums paid to the attorneys, and held that the taxpayer was entitled to the $3,500 deduction claimed

in 1927 (and to the deduction of the amounts of $3,500 and $6,500 paid in 1928 and 1929, respectively). The Board accordingly recomputed the tax for 1927 and entered a final decision in Docket No. 45929 that there was an overpayment for the year 1927 in the amount of $986.21.

It is clear from the foregoing, therefore, that the petitioner did not, in his appeal to the Board, raise the issue which he now raises in the appeal to this Court, *i. e.,* whether he was entitled to the deduction of the entire $20,000 legal fees in the year 1927. It might be pointed out in this connection that petitioner is in error when he represents, in his petition for review addressed to this Court (R. 42) and in his brief (p. 3), that in his appeal to the Board he alleged that the Commissioner erred in denying him the right to deduct the $20,000 legal fees. His petition in the Board of Tax Appeals did not assign as error the disallowance of a deduction of $20,000; it only charged error as to the disallowance of a deduction of "the amount of certain legal fees *paid* by him" (R. 5, italics ours) in that year, and the amount paid is $3,500. In order to raise the issue of the right to deduct the *entire* $20,000 legal fees in 1927, it was incumbent upon the petitioner to place the matter before the Board by appropriate assignment of error to that effect, as is required by the Rules of Practice of the Board. (Rule 5 (d), *supra.*) But his petition contained no such assignment of error; nor did the first amended petition, which he

subsequently filed in this proceeding (R. 24–27), raise this issue. The new assignment of error set forth in the first amended petition does not refer to the subject matter of the legal fees at all. It is to be noted further that the petitioner closed his petition to the Board with the statement that he "confidently expected" that "those two disallowed items" (one item being the $3,500 deduction, and the other being a deduction for bad debts) "will be allowed and *that the return as filed will be approved*" (R. 17, italics ours). The return, as has been stated, sought only the deduction of $3,500 accrued and paid in 1927. Nothing more is said in the petition to the Board as to this item of legal fees. The formal prayer for relief merely asks that his appeal be heard and determined. The petition contains nothing which in any way suggests the issue of the right to a deduction of the entire $20,000 in the year 1927.

It is evident, therefore, that this issue is raised for the first time in the petition for review filed in this Court, by an assignment of error to the effect that the Board erred in failing to allow as a deduction for the year 1927 the entire sum of $20,000 legal fees.[2] (Assignment No. 1, R. 43.)

[2] In this connection we might point also to the fallacy of assignment of error No. 3 (R. 43), and to the argument advanced in petitioner's brief (p. 17), to the effect that if the Board is correct in its holding that only $3,500 of the legal fees was deductible in 1927, then the Board erred in failing to hold that all of the other items of income should have been

Thus, it is not deemed necessary to answer all of the arguments advanced in petitioner's brief or to discuss all of the cases therein referred to in support of his claim that he was entitled to the deduction of the entire $20,000 in 1927. Such a discussion is wholly beside the point. The issue of the right to a deduction of the entire $20,000 in 1927 was not raised in the Board of Tax Appeals, and is not therefore properly before the Court. The Circuit Courts of Appeals have generally held that they will not pass upon an issue not presented to the Board. *Glassell* v. *Commissioner,* 42 F. (2d) 653 (C. C. A. 5th); *Atkins' Estate* v. *Lucas,* 36 F. (2d) 611 (App. D. C.); *Jeffery* v. *Commissioner,* 62 F. (2d) 661 (C. C. A. 6th). It is fundamental that a party litigant must recover, if at all, on the causes of action stated in his pleadings. *Atlantic Casket Co.* v. *Rose,* 22 F. (2d) 800 (C. C. A. 5th). A party cannot set up additional causes of action on appeal. *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308. It has been repeatedly stated that a question not raised below, nor assigned as error, is not properly before the Court on review. *Blair* v. *Oesterlein Co.,* 275 U. S. 220, 225; *Magruder* v. *Drury,* 235 U. S. 106, 113. Issues are framed before the Board of Tax Appeals as well as other tribunals by pleadings, and issues not litigated be-

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placed on the cash basis. The petitioner did not before the Board claim that they should, and there is therefore no merit to such claim, when raised for the first time on appeal to the Court.

fore the Board cannot be litigated before this Court on appeal. See *Moise* v. *Burnet,* 52 F. (2d) 1071 (C. C. A. 9th).

In addition to the foregoing, it is submitted that the decision of the Board should be upheld on another ground, *i. e.,* equitable estoppel, or estoppel *in pais*, which we will now discuss but briefly. Although he had made returns of his income on the accrual basis for years, the petitioner, having treated this item of legal fees on the cash basis, and having accrued and deducted only the amounts paid respectively in the years 1927 and 1928, and having accepted the benefits of the decision of the Board allowing him the deduction of $3,500 paid in 1928 and $6,500 paid in 1929, should now be estopped from claiming the deduction of the entire $20,000 in 1927. The record before this Court shows that he has sought by his return and obtained by the Board's decision the deduction of $3,500 and $6,500 in 1928 and 1929, respectively, in addition to $3,500 sought and obtained for the year 1927. To uphold the claim raised in his present appeal to this Court and to allow him to deduct the entire $20,000 in the year 1927, would result in allowing him the deduction of thousands of dollars more than the amount of legal fees fixed by the contract. Having departed from the accrual basis as to this item and having employed the cash basis as to it, and having sought and obtained deductions for the amounts paid in 1928 and 1929, the taxpayer cannot now, at

his election, change his position and go back now to the accrual basis and accrue the entire amount in 1927, especially while he retains the benefits of the deductions allowed him for the years 1928 and 1929 on this item.

The doctrine of equitable estoppel or estoppel *in pais* is so firmly established and has been so frequently applied in tax cases that we refrain from burdening this brief with any detailed discussion of the authorities. *Askin & Marine Co.* v. *Commissioner,* 66 F. (2d) 776 (C. C. A. 2nd); *Putnam Nat. Bank* v. *Commissioner,* 50 F. (2d) 158 (C. C. A. 5th); *Ramsey* v. *Commissioner,* 26 B. T. A. 277, affirmed 66 F. (2d) 316 (C. C. A. 10th); *Moran* v. *Commissioner,* 67 F. (2d) 601 (C. C. A. 1st); *Matern* v. *Commissioner,* 61 F. (2d) 663 (C. C. A. 9th); *Stearns Co.* v. *United States,* 291 U. S. 54; *Bothwell* v. *Commissioner,* 77 F. (2d) 35 (C. C. A. 10th); *Wheelock* v. *Commissioner,* 77 F. (2d) 474 (C. C. A. 5th); *Commissioner* v. *Liberty Bank & Trust Co.,* 59 F. (2d) 320 (C. C. A. 6th); *Haag* v. *Commissioner,* 59 F. (2d) 514 (C. C. A. 7th); *Edward G. Swartz, Inc.,* v. *Commissioner,* 69 F. (2d) 633 (C. C. A. 5th); *Larkin & Doolittle* v. *United States* (C. C. A. 8th), decided August 15, 1935, not officially reported but found in Vol. 1, Prentice-Hall, 1935, par. 1823.

It might be pointed out before closing that the record contains no statement of evidence, and that, no evidence being presented to this Court, the find-

ings of the Board as hereinbefore set forth cannot be challenged, but must be taken as correct; and, since the Board's decision is supported by the findings, the order of the Board cannot but be affirmed, inasmuch as the new issue presented by the petitioner is not properly before the Court.

CONCLUSION

It is submitted that the decision of the Board of Tax Appeals should be affirmed.

Respectfully submitted.

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